(82)

No: 01-653-CFX Title: Federal Communications Commission, Petitioner
v.
NextWave Personal Communications Inc., et al.

Docketed: October 19, 2001 Court: United States Court of Appeals for the District of Columbia Circuit

Vide:
01-657

Entry	Date	Proceedings and Orders
	Sep 10 2001	Application (01A237) to extend the time to file a petition for a writ of certiorari from September 20, 2001 to September 28, 2001, submitted to The Chief Justice.
	Sep 13 2001	Application (01A237) granted by the Chief Justice extending the time to file until October 19, 2001.
	Oct 19 2001	Petition for writ of certiorari filed. (Response due February 1, 2002)
	Oct 19 2001	Appendix of petitioner filed (Volumes I & II).
	Nov 8 2001	Waiver of right of respondent Verizon Wireless to respond filed. VIDED.
	Nov 15 2001	Order extending time to file response to petition until January 18, 2002.
	Nov 15 2001	This extension of time is granted for all respondents.
	Nov 16 2001	Waiver of right of respondent Sprint Spectrum L.P. to respond filed.
	Nov 20 2001	Waiver of right of respondent Telecorp PCS, Inc. to respond filed.
	Jan 3 2002	Application (01A480) for leave to file a consolidated brief in opposition in excess of the page limitations, submitted to The Chief Justice.
	Jan 7 2002	Application (01A480) denied by the Chief Justice.
	Jan 14 2002	Order further extending time to file response to petition until February 1, 2002.
	Feb 1 2002	Brief of respondents NextWave Personal Communications Inc., et al. in opposition filed. VIDED.
	Feb 1 2002	Motion of Urban Comm-North Carolina, Inc., for leave to file a brief as amicus curiae filed.
	Feb 13 2002	Reply brief of petitioner Federal Communications Commission filed.
	Feb 13 2002	DISTRIBUTED for Conference of March 1, 2002
	Mar 4 2002	Motion of Urban Comm-North Carolina, Inc., for leave to file a brief as amicus curiae GRANTED.
	Mar 4 2002	Petition GRANTED. The cases are consolidated and a total of one hour is allotted for oral argument. SET FOR ARGUMENT October 8, 2002. **********
	Apr 8 2002	Order extending time to file the joint appendix and the government's brief on the merits to and including May 6, 2002. Order extending time to file respondents' brief on the merits to and including June 21, 2002.
	May 6 2002	Joint appendix filed. VIDED.
	May 6 2002	Brief of petitioner Federal Communications Commission filed. VIDED.

3 pp

Entry	Date	Proceedings and Orders
	May 6 2002	Brief of petitioners Arctic Slope Regional Corporation, et al. filed. VIDED.
	Jun 18 2002	Consent to the filing of amicus briefs received from counsel for the respondents. VIDED.
	Jun 21 2002	Brief amici curiae of Patrick Leahy, et al. filed. VIDED.
	Jun 21 2002	Brief of respondents NextWave Personal Communications Inc. and NextWave Power filed. VIDED.
	Jun 21 2002	LODGING consisting of twenty copies of two large bound volumes of material received from counsel for the respondents. VIDED.
	Jun 21 2002	Brief amicus curiae of Creditors of NextWave Personal Communications, Inc. filed. VIDED.
	Jun 21 2002	Motion of Creditors of NextWave Personal Communications, Inc. for leave to participate in oral argument as amici curiae and for divided argument filed.
	Jun 21 2002	Brief amici curiae of Urban Comm-North Carolina, Inc., et al. filed. VIDED.
	Jun 21 2002	Brief amicus curiae of Airadigm Communications, Inc. filed. VIDED.
	Jun 21 2002	Brief amicus curiae of Kathryn R. Heidt filed. VIDED.
	Jun 25 2002	Motion of the Acting Solicitor General for divided argument filed.
	Jun 28 2002	Motion of the Acting Solicitor General for divided argument GRANTED.
	Jun 28 2002	Motion of Creditors of NextWave Personal Communications, Inc. for leave to participate in oral argument as amici curiae and for divided argument GRANTED.
	Jul 5 2002	Application (02A30) for an extension of time within which to file petitioners' reply briefs on the merits, submitted to The Chief Justice.
	Jul 12 2002	Application (02A30) granted by the Chief Justice extending the time to file until August 12, 2002.
	Jul 23 2002	CIRCULATED.
	Aug 12 2002	Reply brief of petitioner Federal Communications Commission filed. VIDED.
	Aug 12 2002	Reply brief of petitioners Arctic Slope Regional Corporation, et al. filed. VIDED.
	Aug 15 2002	Record filed.
	Sep 13 2002	Letter by the Solicitor General with attached FCC Public Notice DISTRIBUTED.
	Sep 20 2002	Motion of respondents Nextwave Personal Communications, et al. for leave to file supplemental appendix filed.
	Sep 20 2002	Supplemental brief of respondents Nextwave Personal Communications, Inc., et al. filed. VIDED.
	Sep 26 2002	Opposition of Federal Communications Commission to motion of respondents Nextwave Personal Communications, et al. filed.
	Sep 26 2002	Opposition of Arctic Slope Regional Corporation, et al. to motion of respondents Nextwave Personal Communications, et al. filed.
	Sep 30 2002	Supplemental brief of petitioner Federal Communications Commission filed. VIDED.
	Sep 30 2002	Supplemental brief of petitioners Arctic Slope Regional Corportion, et al. filed. VIDED.
	Oct 1 2002	Motion of respondents Nextwave Personal Communications, et al. for leave to file supplemental appendix DENIED.
	Oct 1 2002	LODGING consisting of forty copies of a bound supplemental appendix received from counsel for the respondents.VIDED.
	Oct 8 2002	ARGUED.

No: 01-653-CFX

01 653 OCT 17 2001

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC. AND NEXTWAVE POWER PARTNERS INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY A. LAMKEN
Assistant to the Solicitor General

WILLIAM KANTER
JACOB M. LEWIS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOHN A. ROGOVIN
Deputy General Counsel

DANIEL M. ARMSTRONG
JOEL MARCUS
Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether Section 525 of the Bankruptcy Code, 11 U.S.C. 525, conflicts with and displaces the Federal Communications Commission's rules for congressionally authorized spectrum auctions, which provide that wireless telecommunications licenses obtained at auction automatically cancel upon the winning bidder's failure to make timely payments to fulfill its winning bid.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Reasons for granting the petition	12
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Board of Governors v. *MCorp Fin., Inc.*, 502 U.S. 32 (1991)	25
Crawford Fitting Co. v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)	21
FCC v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940)	28-29
Gull Air, Inc., In re, 890 F.2d 1255 (1st Cir. 1986)	27
Johnson v. *Edinboro State College*, 728 F.2d 163 (3d Cir. 1984)	21-22
Midlantic Nat'l Bank v. *New Jersey Dep't of Envt'l Prot.*, 474 U.S. 494 (1986)	25
Morton v. *Mancari*, 417 U.S. 535 (1974)	21
Nathanson v. *Labor Board*, 344 U.S. 25 (1952)	21
NextWave Telecom, Inc. v. *FCC*, No. 98-1255, 1998 WL 389116 (D.C. Cir. June 11, 1998)	7
West Virginia Univ. Hosp., Inc. v. *Casey*, 499 U.S. 83 (1991)	21
U.S. Airwaves, Inc. v. *FCC*, 232 F.3d 227 (D.C. Cir. 2000)	6
United States v. *Dyer*, 216 F.2d 568 (7th Cir. 2000)	24

Statutes and regulations: Page

Act of Aug. 5, 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 258 3
Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
Ch. 3, 11 U.S.C. 301 *et seq.*:
11 U.S.C. 362(a) 9
11 U.S.C. 362(a)(4) 28
11 U.S.C. 362(a)(5) 28
11 U.S.C. 362(b)(4) (1994 & Supp. V 1999) 10, 11, 25, 28
Ch. 5, 11 U.S.C. 501 *et seq.*:
11 U.S.C. 525 ..... *passim*
11 U.S.C. 525(a) 11, 19, 21, 23, 28
11 U.S.C. 544 (1994 & Supp. V 1999) 7
Ch. 11, 11 U.S.C. 1101 *et seq.* 23
11 U.S.C. 1141(d)(1) 23
Communications Act, 47 U.S.C. 151 *et seq.*:
47 U.S.C. 301 ..... 2, 26
47 U.S.C. 309(a) 2
47 U.S.C. 309(i) (1994 & Supp. V 1999) 2
47 U.S.C. 309(j) (1994 & Supp. V 1999) ..... *passim*
47 U.S.C. 309(j)(1) (1994 & Supp. V 1999) 3
47 U.S.C. 309(j)(3)(A) 3, 14, 15, 20
47 U.S.C. 309(j)(3)(B) 3, 4
47 U.S.C. 309(j)(3)(C) 3, 14
47 U.S.C. 309(j)(3)(D) (1994 & Supp. V 1999) 3, 14
47 U.S.C. 309(j)(4)(A) 3, 4, 18
47 U.S.C. 309(j)(6)(C) 26, 27
47 U.S.C. 309(j)(6)(D) 26, 27
Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087 3
28 U.S.C. 157(a) 23
28 U.S.C. 157(b)(1) 23
28 U.S.C. 157(b)(2)(L) 23
28 U.S.C. 1334(a) 23

Regulations—Continued: Page

47 C.F.R. (1997):
Section 1.2108 19
Section 1.2110(e)(4) 4, 15, 22
Section 1.2110(e)(4)(iii) 4, 15
Section 24.708(a) 4, 15
Section 24.709(a)(1) 4
Section 24.711(a)(2) 5
Section 24.711(b) 5
Section 24.711(b)(3) 5
Section 24.716 5
Section 24.830(a) 19
Miscellaneous:
Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, In re:
12 FCC Rcd 16,436 (1997) 6
13 FCC Rcd 15,743 (1998) 19
14 FCC Rcd 6571 (1999) 6
Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Sixth Report, FCC No. 01-192 (July 17, 17, 2001) 14, 15
Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses, In re, 12 FCC Rcd 2030 (1997) 5, 19
H. R. Conf. Rep. No. 208, 97th Cong., 1st Sess. (1981) 2
H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) 27
H.R. Rep. No. 111, 103d Cong., 1st Sess. (1993) 2, 3, 14, 18, 20, 26
Implementation of Section 309(j) of the Communications Act—Competitive Bidding, In re:
9 FCC Rcd 2348 (1994) 3, 4, 14-15, 18
9 FCC Rcd 5532 (1994) 4
4 L. King, *Collier on Bankruptcy* (15th ed. 2001) 22, 28

Miscellaneous—Continued: Page

Notice of Alternative Policy Options for Managing Capacity at LaGuardia Airport and Proposed Extension of the Lottery Allocation, 66 Fed. Reg. 31,737 (2001) 20

Petition of NextWave Telecom, Inc. for a Stay of June 8, 1998 Personal Communications Services C Block Election Date, In re, 13 FCC Rcd 11,880 (1998) 7

Public Notice, *D, E and F Block Auction Closes*, DA 97-81, 1997 WL 20711 (Jan. 15, 1997) 5

Public Notice, *DA 00-49 Auction of C and F Block Broadband PCS Licenses, NextWave Personal Communications, et al. Petition for Reconsideration, In re*, 15 FCC Rcd 17,500 (2000) 7

Public Notice, *Wireless Telecommunications Bureau Announces June 8, 1998 Election Date*, 13 FCC Rcd 7413 (1998) 7

S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 27

Second Report and Order and Further Notice of Proposed Rule Making, *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 12 FCC Rcd 16,436 (1997) 17

In the Supreme Court of the United States

No.

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC. AND NEXTWAVE POWER PARTNERS INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Federal Communications Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 254 F.3d 130. The Federal Communications Commission's Public Notice announcing re-auction of the radio spectrum previously licensed to respondents (Pet. App. 96a-97a) is reported at 15 FCC Rcd 693, and its order denying respondents' petition for reconsideration (Pet. App. 52a-95a) is reported at 15 FCC Rcd 17,500.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2001. On September 13, 2001, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 19, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 309(j) of the Communications Act, 47 U.S.C. 309(j) (1994 & Supp. V 1999), and Section 525 of the Bankruptcy Code, 11 U.S.C. 525, are reprinted in an appendix to this petition. Pet. App. 417a-469a.

STATEMENT

1. The Communications Act (the Act) seeks "to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. 301. The Act establishes the Federal Communications Commission (FCC or Commission) and vests it with the authority to issue radio licenses upon its determination that doing so will serve the "public interest, convenience, and necessity." 47 U.S.C. 309(a).

For many years, the FCC attempted to identify the license applicant that would best serve the public interest through comparative hearings at which the FCC examined the qualifications of each competing applicant. Concerned about the "substantial delays and burdensome costs" associated with the hearing process, H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981), Congress amended the statute in 1982 to authorize the FCC to award initial licenses to qualified applicants "through the use of a system of random selection," or lottery. See 47 U.S.C. 309(i) (1994 & Supp. V 1999); Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087. The lottery system also proved unsatisfactory. Among other things, it was criticized for "encouraging unproductive speculation for spectrum licenses" and failing "to reward persons who have spent money to research and develop a new technology or service." H.R. Rep. No. 111, 103d Cong., 1st Sess. 248 (1993).

Accordingly, in 1993 Congress authorized the FCC to award initial licenses for spectrum dedicated to certain commercial services "through a system of competitive bidding," or auction. 47 U.S.C. 309(j)(1) (1994 & Supp. V 1999). Congress recognized that such a system would eliminate speculation, because those who lack an efficient and immediate plan for using the spectrum generally will not submit the highest bid. See H.R. Rep. No. 111, *supra*, at 249. Through the auction mechanism, Congress sought to enable the FCC to further "the development and rapid deployment of new technologies, products and services" to benefit the public, 47 U.S.C. 309(j)(3)(A), assist in the "recovery for the public of a portion of the value of the public spectrum," 47 U.S.C. 309(j)(3)(C), and promote "the efficient and intensive use of the electromagnetic spectrum," 47 U.S.C. 309(j)(3)(D) (1994 & Supp. V 1999). In 1997, Congress mandated the use of auctions for most future licensing proceedings. Pub. L. No. 105-33, § 3002, 111 Stat. 258.

Congress also directed the Commission to promote "economic opportunity and competition * * * by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses." 47 U.S.C. 309(j)(3)(B). Congress expressly instructed the Commission to "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments." 47 U.S.C. 309(j)(4)(A).

The FCC chose to award licenses using simultaneous, multiple-round auctions. *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 2348, ¶ 68 (1994). The FCC concluded that an auction design "that award[s] licenses to those parties that value them most highly" would best fulfill the statute's goals. *Id.* at ¶ 69. The agency explained: "Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increase the value of a license to a bidder, an auction design that awards licenses to

those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services in each area and the efficient and intensive use of the spectrum." *Id.* at ¶ 71 (footnote omitted).

To ensure broad dissemination of licenses, see 47 U.S.C. 309(j)(3)(B), the FCC sought to encourage small businesses and other "designated entities" to participate in the auction process by providing them with bidding credits. 9 FCC Rcd 2348, ¶ 229. The FCC also restricted eligibility for certain auctions to small businesses and other designated entities. *Ibid.* For example, the spectrum dedicated to broadband personal communications services (PCS)—a new generation of mobile telecommunications services, 9 FCC Rcd 5532, ¶ 6—was divided into six auction blocks, identified by the letters "A" through "F." See *ibid.* Participation in the "C" and "F" Block auctions was limited to small businesses and other designated entities. 47 C.F.R. 24.709(a)(1) (1997). Finally, in accordance with 47 U.S.C. 309(j)(4)(A), the FCC decided to allow small businesses that obtained licenses at auction to pay in installments over the term of the license. 9 FCC Rcd 2348, ¶ 229.

To ensure the integrity of competitive bidding as a rational means of license allocation, and to ensure that spectrum is neither awarded to nor held by insincere or lower-value bidders, the FCC's auction rules specify that license awards "will be conditioned upon full and timely payment of the winning bid amount." 47 C.F.R. 24.708(a) (1997). For bidders electing to pay in installments, the rules provided that any "license granted * * * shall be conditioned upon the full and timely performance of the licensee's obligations under the installment plan," 47 C.F.R. 1.2110(e)(4) (1997), and that, in the event of failure to make timely payments, "the license will automatically cancel." 47 C.F.R. 1.2110(e)(4)(iii) (1997).

2. Respondent NextWave Personal Communications Inc. (NPCI) was formed to participate in the FCC's auction for

"C-Block" PCS licenses in the summer of 1995. NPCI was declared the high bidder for 63 C-Block licenses after it submitted winning bids totaling $4.74 billion. Pet. App. 4a-5a. Respondent NextWave Power Partners Inc. (NPPI) was formed to participate in the FCC's F-Block license auction, which concluded in January of 1997. NPPI was declared the high bidder for 27 F-Block licenses after it submitted winning bids of approximately $123 million. See Pet. App. 313a-314a; *Public Notice, D, E, and F Block Auction Closes*, DA 97-81, 1997 WL 20711 (Jan. 15, 1997).

In accordance with FCC regulations, respondents deposited sufficient funds to cover their downpayment obligations, see Pet. App. 5a, and executed promissory notes for the balance of their bids, to be paid in installments. Pet. App. 313a.[1] After considering challenges to NPCI's compliance with foreign ownership rules, the FCC granted the licenses, conditioned on NPCI's compliance with an ownership restructuring plan and respondents' compliance with all other regulatory conditions. See *In re Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses*, 12 FCC Rcd 2030, ¶¶ 8-9 (1997).

Consistent with FCC requirements, each license stated that it was "conditioned upon the full and timely payment of all monies due" and that failure to comply with that obligation "will result in the automatic cancellation" of the license. Pet. App. 388a. Likewise, the Installment Plan Note executed by respondents acknowledged that the licenses

---

[1] Applicants eligible for the C-Block auction were required to pay only ten percent of their winning bid in cash by the time of the license grant, 47 C.F.R. 24.711(a)(2) (1997), with the remaining balance to be paid over the ten-year term of the license. 47 C.F.R. 24.711(b) (1997). For an applicant such as NPCI that qualified as a "small business," the interest rate was the rate for ten-year Treasury obligations on the day the license was granted, with interest-only payments for the first six years. 47 C.F.R. 24.711(b)(3) (1997). Favorable terms were also available to small business bidders for F-Block licenses. See 47 C.F.R. 24.716 (1997) (20 percent downpayment and interest-only payments for the first two years).

were "conditioned upon full and timely payment" of respondents' obligations to the FCC, *id.* at 393a, and the associated Security Agreements stated that the company's "continued retention of the License[s]" was "conditioned on compliance with * * * Commission orders and regulations," *id.* at 413a. The Security Agreements further noted that any rights created by those agreements were in addition to, not in contravention of, the FCC's regulatory powers. *Id.* at 403a-404a.

After the licenses were awarded, a number of C-Block and F-Block licensees, including respondents' parent company, petitioned the Commission to restructure their installment payment obligations, describing "a range of apparent difficulties in accessing the capital markets" because of the prices they had bid for the licenses. *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 12 FCC Rcd 16,436, ¶ 11 (1997). After temporarily suspending payment obligations for C-Block and F-Block licensees, the Commission adopted several options designed to aid C-Block licensees. See *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 13 FCC Rcd 8345, ¶¶ 11-15 (1998); *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 14 FCC Rcd 6571 (1999). See also *U.S. Airwaves, Inc.* v. *FCC*, 232 F.3d 227, 236 (D.C. Cir. 2000) (upholding restructuring scheme). The Commission refused, however, "to adopt proposals that result in a dramatic forgiveness of the debt owed," because such a resolution "would be very unfair to other bidders, and would gravely undermine the credibility and integrity of [the auction] rules." 12 FCC Rcd 16,436, at ¶ 19. Accordingly, none of the restructuring options adopted by the Commission allowed C-Block licensees to keep any license for less than the full amount that they had bid. See 13 FCC Rcd 8345, ¶ 8; *U.S. Airwaves*, 232 F.3d at 235.

The Commission gave C-Block licensees until June 8, 1998, to elect a restructuring option, provided that licensees should resume payments by July 31, 1998, and set October 29, 1998, as the last date on which it would accept late installment payments (with a late fee). Public Notice, *Wireless Telecommunications Bureau Announces June 8, 1998 Election Date*, 13 FCC Rcd 7413 (1998). Respondents and others unsuccessfully sought to stay the election deadline. See *In re Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998 Personal Communications Services C Block Election Date*, 13 FCC Rcd 11,880 (1998); *NextWave Telecom Inc.* v. *FCC*, No. 98-1255, 1998 WL 389116 (D.C. Cir. June 11, 1998). Respondents did not make an election by the June 8, 1998, deadline. Instead, they filed for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. They did not meet the October 29 deadline for resuming the payments that were an express condition of their licenses. See *In re Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses, NextWave Personal Communications, et al., Petition for Reconsideration*, 15 FCC Rcd 17,500, ¶ 5 (2000).

3. Respondent NPCI filed an adversary proceeding in bankruptcy court, seeking to avoid most of its payment obligation for the C-Block licenses as a constructively fraudulent conveyance under 11 U.S.C. 544 (1994 & Supp. V 1999). Ruling in respondents' favor, the court held that the licenses were worth less than respondents' bid amount, and that roughly $3.72 billion of NPCI's $4.74 billion payment obligation should therefore be avoided as constructively fraudulent. The bankruptcy court ordered that NPCI be permitted to keep its licenses while meeting only $1.023 billion of its $4.74 billion payment obligation. Pet. App. 357a-358a. The district court affirmed. *Id.* at 254a, 272a.

The Second Circuit reversed and remanded for further proceedings, "if any are necessary." Pet. App. 253a. Although the bankruptcy court had rested its decision to alter license conditions on the theory that they concerned "solely the debtor-creditor relationship between the FCC and [NextWave]," the Second Circuit rejected that approach as "fundamentally mistaken." *Id.* at 234a-235a. Instead, the Second Circuit viewed the payment condition of respondents' licenses as quintessentially regulatory. "The FCC had not sold NextWave something that the FCC had owned," the court explained. Instead, the FCC "had used the willingness and ability of NextWave to pay more than its competitors as the basis on which it decided to grant the [l]icenses to NextWave." *Id.* at 234a. Thus, "NextWave's inability to follow through on its financial undertakings had more than financial implications." *Ibid.* Rather, "[i]t indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." *Ibid.* "By holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion," the court of appeals concluded, the "bankruptcy and district courts impaired the FCC's method for selecting licensees by effectively awarding the [l]icenses to an entity that the FCC determined was not entitled to them." *Id.* at 235a. This Court denied respondents' petition for a writ of certiorari. 531 U.S. 924 (2000).

Respondents then modified their proposed reorganization plan to provide that they would pay their overdue obligation in full and pay future installments as they became due. Pet. App. 146a. In a letter to the FCC, respondents offered to pay the discounted present value of their obligations in a lump sum. *Id.* at 147a. The FCC did not accept the offer because, under FCC regulations, respondents' payment default had caused the licenses to cancel. *Id.* at 61a, 96a. The

FCC therefore issued a Public Notice scheduling the spectrum previously licensed to respondents for re-auction. *Id.* at 96a-97a.

On respondents' motion, the bankruptcy court declared that the FCC's actions were "null, void, and without force or effect." See Pet. App. 113a. The FCC's decision to re-auction the licenses, the bankruptcy court held, violated the Bankruptcy Code's automatic stay, *id.* at 155a-160a, impaired respondents' right to cure their default, *id.* at 160a-163a, and potentially contravened the Code's prohibition against license revocations premised upon the nonpayment of a dischargeable debt, *id.* at 163a-168a (citing 11 U.S.C. 525). In addition, the bankruptcy court held that automatic cancellation was barred by doctrines of equitable estoppel and waiver applicable to the "government * * * act[ing] in a commercial capacity." Pet. App. 181a-191a. The bankruptcy court acknowledged that the Second Circuit had held "that there is a 'regulatory' aspect in the FCC's 'payment in full' requirement." *Id.* at 191a. But the court found "no such aspect * * * with respect to the FCC's 'timely payment' requirement," which it viewed as a matter of "pure debtor-creditor economics." *Ibid.* See also *id.* at 165a-166a.

The Second Circuit granted a writ of mandamus directing the bankruptcy court to vacate its order. The appeals court observed that, in its prior opinion, it had "held that the FCC's decision as to 'which entities are entitled to spectrum licenses under rules and conditions it has promulgated' is a paradigmatic instance of the FCC's exclusive regulatory power over licensing," Pet. App. 116a, and thus beyond the bankruptcy court's authority to revise, *id.* at 108a-109a. The court of appeals rejected the bankruptcy court's conclusion that the timely payment condition in the FCC licenses and regulations was economic rather than regulatory. *Id.* at 118a. "The regulatory purpose for requiring payment in full —the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum

—is quite obviously served in the same way by requiring payment on time." *Id.* at 119a.

The court of appeals also rejected the bankruptcy court's reliance on the Code's automatic stay provision, 11 U.S.C. 362(a). The court emphasized that the automatic stay is by its terms inapplicable to actions to enforce a governmental unit's "police and regulatory power," and that the FCC was "[u]ndoubtedly * * * a governmental unit that is seeking 'to enforce' its 'regulatory power.'" Pet. App. 125a-126a (citing 11 U.S.C. 362(b)(4)). The court of appeals concluded that "[t]he bankruptcy court lacked jurisdiction to declare the Public Notice null and void on any ground: that the Public Notice violated the automatic stay, that the right to cure obviates any default, or that the government was estopped." Pet. App. 127a. This Court again denied certiorari. 531 U.S. 1029 (2000).

4. Respondents filed a petition with the FCC, urging it to reconsider its decision that the spectrum previously licensed to respondents would be re-auctioned. Pet. App. 63a. The FCC denied the petition, finding that license cancellation was "fully consistent" with the statute and regulations, and that the full and timely payment requirement was "paramount" in preserving "the reliability and integrity" of the auction program. *Id.* at 65a-66a. The FCC rejected respondents' contention that the Bankruptcy Code precluded cancellation; that argument, the Commission concluded, had been rejected by the Second Circuit's mandamus opinion and was therefore barred by *res judicata*. *Id.* at 83a. The Commission also ruled that neither estoppel nor waiver prohibited it from enforcing its cancellation rule. *Id.* at 83a-88a.

Respondents filed a petition for review of the FCC's decision in the Court of Appeals for the District of Columbia Circuit. While the petition was pending, the Commission completed its re-auction of the C- and F-Block spectrum associated with respondents' canceled licenses, along with other C- and F-Block spectrum. In the re-auction, the spectrum covered by respondents' licenses produced bids of $15.85 billion, well over three times the $4.74 billion respondents had originally bid, and 15 times the value respondents had assigned to the licenses before the bankruptcy court. See Pet. App. 302a, 357a-358a; p. 7, *supra*. The successful bidders in that re-auction have since paid substantial sums to the Commission—over $3 billion—as deposits pending issuance of the licenses.

On June 22, 2001, the D.C. Circuit reversed the FCC's cancellation decision and remanded the case to the agency. The court rejected the FCC's contention that respondents' Bankruptcy Code arguments had been resolved against them by the Second Circuit. Pet. App. 22a-36a. In the court's view, the Second Circuit merely held "that the Commission's license cancellation was a regulatory act reviewable only by a court of appeals under section 402 of the Communications Act, and thus that the bankruptcy court lacked *jurisdiction* to apply the Code to these acts." *Id.* at 24a (emphasis added). However, the court agreed that the Second Circuit's decision barred NextWave from contesting that the FCC's actions fell within the regulatory power exception to the automatic stay, 11 U.S.C. 362(b)(4), in light of the Second Circuit's unequivocal ruling on that issue. Pet. App. 34a, 125a-127a.

On the merits, the D.C. Circuit held that Section 525 of the Bankruptcy Code, 11 U.S.C. 525, precluded cancellation of respondents' licenses. Section 525 provides that a governmental unit may not revoke a license "solely because" a debtor "has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. 525(a). The court of appeals rejected the FCC's contention that "NextWave's license fee obligation was not a 'dischargeable' debt * * * because the Second Circuit * * * held * * * that so long as NextWave retained its licenses, its payment obligation was subject to neither modification nor discharge in bankruptcy." Pet. App. 41a. The D.C. Circuit read the Second Circuit's decisions as

having "merely decided that insofar as timely payment was a condition for license retention, the bankruptcy court had no authority to modify it." *Id.* at 42a. In the D.C. Circuit's view, the Second Circuit "never decided that a court of competent jurisdiction (such as this one) could not modify or discharge [the timely payment condition] under section 525." *Ibid.* The D.C. Circuit also rejected the FCC's argument that cancellation of respondents' licenses had not occurred "solely because" of respondents' failure to pay a debt within the meaning of Section 525. *Id.* at 44a-46a. The court did not dispute that the purpose of cancellation was to preserve the integrity of the auction process and select the licensee most likely to use the spectrum efficiently for the public benefit. *Id.* at 44a-45a. But it concluded that the licenses were canceled "solely because" of respondents' default because the FCC relied on non-payment as the triggering event for cancellation. *Id.* at 46a.

The D.C. Circuit had "no doubt that in developing its installment payment plan, the Commission made a good faith effort to implement Congress's command to encourage small businesses with limited access to capital to participate in PCS auctions." Pet. App. 48a. The appeals court was also "mindful that * * * allowing NextWave to retain its licenses may be 'grossly unfair' to losing bidders and licensees who 'complied with the administrative process and forfeited licenses or made timely payments despite their financial difficulties.'" *Ibid.* (citation omitted). Ultimately, however, it characterized the Commission as having "enter[ed] a creditor relationship with winning bidders." *Id.* at 50a. The court thus held that "section 525 prevents the Commission, whatever its motive, from canceling the licenses of winning bidders who fail to make timely installment payments while in Chapter 11." *Id.* at 49a.

REASONS FOR GRANTING THE PETITION

Through 42 U.S.C. 309(j), Congress adopted a market-based system of spectrum allocation that awards radio licenses to the applicant best able to use the spectrum effectively and efficiently in the public interest, as demonstrated by the applicant's willingness and ability to pay more for it than others. The District of Columbia Circuit has now held that Section 525 of the Bankruptcy Code, 11 U.S.C. 525, bars the FCC from enforcing the regulatory payment obligations that are an integral part of that licensing mechanism. In so ruling, the court voided the results of a spectrum auction that generated more than $15 billion in revenue for the U.S. Treasury, and effectively confiscated licenses from applicants who stood ready to put that spectrum to its most efficient use. The court's decision, moreover, transfers the licenses to entities that value the spectrum less highly and that, under the FCC rules established at Congress's direction, have forfeited any entitlement to the spectrum.

More fundamentally, the D.C. Circuit's decision dramatically expands the reach of bankruptcy law into an area that Congress has traditionally reserved to the Commission, and needlessly transforms Section 525 into an impediment to the regulatory objectives established by Section 309(j). Congress has directed the FCC to award licenses to further the public interest under the criteria established by the Communications Act and FCC regulations. The D.C. Circuit's holding that the Bankruptcy Code supersedes those regulatory requirements and criteria, and that the spectrum licensing decisions must instead be governed by bankruptcy rules and policies designed to regulate debtor-creditor relationships, flatly conflicts with the analysis of the Second Circuit in this very case. The Second Circuit squarely held that the FCC acts in a regulatory capacity and cannot be treated as a "mere creditor" for bankruptcy purposes when it enforces payment requirements, such as those at issue here, that are

at least partially regulatory in nature. Pet. App. 234a-235a. In contrast, the D.C. Circuit barred the FCC from exercising its regulatory powers to cancel licenses because the agency also had a "creditor relationship with winning bidders." Pet. App. 50a.

1. Section 309(j) of the Communications Act establishes a market-based mechanism to guide the FCC in fulfilling its responsibility to allocate radio licenses in the public interest. The statute directs the FCC to employ a system of competitive bidding to award spectrum licenses in a manner that furthers the development and rapid deployment of telecommunications technologies and the efficient and intensive use of radio spectrum. See 47 U.S.C. 309(j)(3)(A), (C), (D). "Because new licenses would be paid for," the legislative history states, "a competitive bidding system will ensure that spectrum is used more productively and efficiently than if handed out for free." H.R. Rep. No. 111, 103d Cong., 1st Sess. 249 (1993). The competitive bidding system recognizes that the entity willing to pay the most for spectrum will also put the spectrum to its best—its highest and most efficient—use.

Echoing this "classical belief in the efficacy of market forces," Pet. App. 229a, the FCC determined that "auction designs that award licenses to the parties that value them most highly will best achieve" the statute's goals. *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 2348, ¶ 70 (1994). The agency explained:

> Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increase the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services * * * and the efficient and intensive use of the spectrum.

9 FCC Rcd 2348, ¶ 71. The auction mechanism has proved effective in promoting Congress's goals of "development and rapid deployment * * * without administrative or judicial delays." 42 U.S.C. 309(j)(3)(A).[2]

As the Second Circuit explained, however, the license auction mechanism can achieve "fair and efficient allocation of spectrum licenses * * * only if the bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue" and thus "only if the high bid entails the obligation to make good the amount bid." Pet. App. 246a. Consequently, the grant of any license allocated at auction is "conditioned upon full and timely payment of the winning bid amount." 47 C.F.R. 24.708(a) (1997). If licensees opt to pay in installments, the FCC's rules provide that the license "shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan," 47 C.F.R. 1.2110(e)(4) (1997), and "will automatically cancel" in the event of default, 47 C.F.R. 1.2110(e)(4)(iii) (1997). These regulatory requirements were also reflected in the licenses issued to respondents, Pet. App. 388a, as well as the Installment Payment Plan Note, *id.* at 393a, and the Security Agreement, *id.* at 409a. The D.C. Circuit nonetheless held that Section 525 of the Bankruptcy Code prevented respondents' licenses from canceling on

---

[2] To date, the FCC has distributed thousands of licenses worth tens of billions of dollars through more than 30 spectrum auctions. See, *e.g.*, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Sixth Report*, FCC No. 01-192, Tables 1A, 1B (July 17, 2001). That, in turn, has spurred vigorous growth in telecommunications services. In the year ending December 2000, for example, the mobile telephone industry "generated over $52.5 billion in revenues" and "increased subscribership from 86.0 million to 109.5 million." *Id.* at 5. "To date, 259 million people, or almost 91 percent of the total U.S. population, have access to three or more different operators * * * offering mobile telephone service in the counties in which they live." *Id.* at 6.

account of their failure "to make timely installment payments while in Chapter 11." Pet. App. 49a.

That erroneous construction of Section 525 substantially thwarts the market-based license allocation mechanism Congress established in Section 309(j). As the Second Circuit explained, if the results of a spectrum auction "can be adjusted in bankruptcy proceedings so that the high bidder takes the license without paying the amount of the high bid, the auction as a mechanism for determining" which applicant values the licenses most highly "is impaired." Pet. App. 246a. For that very reason, the Second Circuit rejected respondents' attempt to use bankruptcy law to keep their licenses while reducing their payment obligation from $4.7 billion to just over $1 billion. The reality that a dollar received today is worth more than one received a year from now—commonly known as the time value of money—means that the same impairment occurs when a bidder fails to pay on time. The FCC evaluated and selected the high bidder based on assumptions about when payment would be received and the consequences of default. "Time of payment and amount of payment are alike functions of value." Pet. App. 119a. Respondent recognized as much by offering to pay a discounted amount on an accelerated schedule. *Id.* at 147a. In short, "the regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time." *Id.* at 119a. If a bidder does not make timely payments, it necessarily draws into question whether the bidder was, in fact, the entity willing and able to pay the most for the spectrum.

By preventing the Commission from enforcing its full and timely payment rules, the D.C. Circuit's decision frustrates achievement of the central goal of spectrum auctions, and prevents the FCC from correcting a demonstrated distortion of the bidding process. Indeed, the Commission itself declined to provide regulatory relief from the full and timely payment requirements precisely because doing so would "gravely undermine the credibility and integrity of [its] rules." Second Report and Order and Further Notice of Proposed Rule Making, *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 12 FCC Rcd 16,436, ¶ 19 (1997). Only by requiring winning bidders to make good on their bid obligations can the Commission prevent speculative or insincere bidding. The D.C. Circuit's rule allows bidders that value the spectrum less than others —because they propose putting it to less valuable and intensive use—to outbid those that value the spectrum more highly, in the hope that licenses will increase in value over time or, if they do not, that the bidder will be able to adjust the bid price downward or extend payment terms in bankruptcy. Moreover, a bidder's inability to raise capital to meet its bid demonstrates that, in the market's view, the bidder cannot generate the public value through the license that its bid otherwise indicated.

For that very reason, the Second Circuit declined to construe the Bankruptcy Code as intruding on the FCC's spectrum allocation function. A bidder's failure to make full and timely payment, the Second Circuit explained, "ha[s] more than financial implications." Pet. App. 234a. Instead, it "indicate[s] that under the predictive mechanism created by Congress to guide the FCC," the defaulting bidder is "not the applicant most likely to use the [l]icenses efficiently for the * * * public in whose interest they were granted"; *i.e.*, "in regulatory terms," it indicates that the bidder is "not entitled to the [l]icenses." *Ibid.* By granting licensees immunity from the consequences of their nonpayment, the D.C. Circuit establishes a system that awards licenses to entities that, under the system of license allocation established by Section 309(j), have no entitlement to them; it awards licenses to entities that will not use them to their greatest public

benefit; and it causes that spectrum to be tied up in protracted litigation rather than being placed into immediate service. Pet. App. 235a.

The D.C. Circuit dismissed the conflict between its ruling and the achievement of Congress's goals on the ground that "nothing in the Act required the Commission to choose" to permit winning bidders to pay their bids in installments. Pet. App. 49a-50a. But Congress specifically directed the FCC to "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments" to promote small business participation. 47 U.S.C. 309(j)(4)(A).[3] The D.C. Circuit's decision effectively renders those congressionally sanctioned means inconsistent with achievement of the statute's ends.[4]

More fundamentally, the court of appeals' decision strikes not merely at installment payments but at the core of the auction regime. Section 525 states that a governmental

[3] Congress was "concerned that, unless the Commission [was] sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries." H.R. Rep. No. 111, *supra*, at 254. Methods such as installment payment schedules were designed to head off the possibility that spectrum auctions "could inadvertently have the effect of favoring only those with 'deep pockets,'" or "incumbents, with established revenue streams, over new companies or start-ups." *Id.* at 255. In light of those considerations, the FCC determined that "installment payments [would] be an effective way to efficiently promote the participation of small businesses * * * and an effective tool for efficiently distributing licenses and services among geographic areas." 9 FCC Rcd 2348, ¶ 233.

[4] The D.C. Circuit suggested that its ruling might leave open alternative means for promoting small business participation in FCC spectrum auctions. The court stated, for example, that "the Commission could have required winning bidders to obtain third party guarantees for their license fee obligations, or required full upfront payment from C Block licensees and helped them obtain loans from third parties." Pet. App. 50a. But the FCC considered and rejected precisely those alternatives because they present the very obstructions to capital access that the installment payment rules were intended to alleviate. See 9 FCC Rcd 2348, ¶¶ 230, 233. The court of appeals' contrary ruminations improperly substitute the court's view of the public interest for that of the FCC.

agency may not "revoke" or "suspend" a license solely for nonpayment of a debt dischargeable in bankruptcy. But it also states that an agency may not "deny" a license, or "refuse to renew" one, solely for nonpayment of such a debt. 11 U.S.C. 525(a).[5] Section 525 draws no distinction between cancellation for noncompliance with an installment payment plan and denial of a license for failure to satisfy a prelicensing payment requirement, *i.e.*, failure to come up with the bid price in the first instance.[6]

A more destructive threat to the Commission's auction process—or any other market-based license allocation regime—is difficult to imagine.[7] It does not merely embroil

[5] Thus, the FCC's suspension of its installment payment program, *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 13 FCC Rcd 15,743, ¶ 50 (1998), neither eliminates the adverse consequences of the court of appeals' decision nor undermines the necessity of this Court's review. Further, the decision to suspend the installment payment program reflected the delays and difficulties that have been created by use of the bankruptcy process. As the Commission explained, the statutory objective "to speed service to the public cannot be achieved when licenses are held in abeyance in bankruptcy court." *Ibid.* Finally, there are several hundred licenses (in addition to those held by respondents) with installment payment conditions outstanding, and those licenses contain regulatory payment obligations of over $2.4 billion.

[6] In practice, there can be substantial delays between the submission of a high bid and the date that full payment is due. FCC rules provide that the qualifications of the winning bidder are not definitively resolved until examination of the "long-form" application for licenses filed by the winning bidder at the close of the auction. See Pet. App. 217a. At that time, interested parties are permitted to file petitions to deny on the ground that granting the license would be inconsistent with the public interest. See 47 C.F.R. 24.830(a), 1.2108. Because of the long-form application requirement, and the filing of petitions to deny, respondent NPCI was not conditionally granted the C-Block licenses for which it had been the high bidder in May and July 1996 until January 3, 1997. See *In re Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses*, 12 FCC Rcd 2030, ¶¶ 3-9 (1997).

[7] For example, the D.C. Circuit's ruling potentially threatens the Federal Aviation Administration's proposal, sugggested by the Port Authority of New York and New Jersey, to allocate landing slots at

licenses in protracted bankruptcy-related litigation, severely undermining Congress's goal of rapid deployment "without administrative or judicial delays." 42 U.S.C. 309(j)(3)(A). It also renders suspect the regulatory condition that is most central in identifying the applicant that will best use a license in the public interest. Under the auction mechanism, it is the winning bidder's willingness *and ability* to pay the most for the license that identifies it as the party that will best use the spectrum in the public interest. If later events belie the bidder's expressed willingness and ability to pay, the bidder no longer satisfies the key regulatory condition that its use of the spectrum be the one that best promotes the public interest. See pp. 8, 9-10, 14-16, *supra*. Yet, under the reasoning of the D.C. Circuit's decision, the licensee's demonstrated inability to meet its payment obligation—*i.e.*, proof that the most central consideration in selecting it over other applicants no longer holds true—cannot be invoked as the reason for reallocating the spectrum.[8]

2. Such interference with the proper functioning of Congress's and the FCC's market-based spectrum allocation mechanism is not a necessary consequence of the Bankruptcy Code. To the contrary, it results solely from the D.C.

LaGuardia Airport through the use of an auction mechanism. *Notice of Alternative Policy Options for Managing Capacity at LaGuardia Airport and Proposed Extension of the Lottery Allocation*, 66 Fed. Reg. 31,731, 31,737 (2001).

[8] The court also suggested that the Commission "could have made license grants conditional on periodic checks of financial health, a more extensive credit check, or some other evidence that winning bidders were capable of using their licenses in the public interest." Pet. App. 50a. But the auction process was established to identify the *best* user of scarce spectrum, not merely one that meets marginal qualifications. If the bidder cannot meet its bid obligation, the market-based conclusion that it is the best user of the spectrum is fatally undermined. In any event, it was precisely to avoid the need for subjective inquiries into whether the bidder is more or less qualified than others—with attendant uncertainty and delays—that Congress replaced comparative hearings with the auction mechanism. See H.R. Rep. No. 111, *supra*, at 248.

Circuit's misconstruction of Section 525. It is a fundamental canon of statutory construction that statutes, where possible, should be construed so as to prevent them from obstructing one another. See *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). Cf. *Nathanson* v. *Labor Board*, 344 U.S. 25, 30 (1952) ("wise administration * * * demands that the bankruptcy court accommodate itself to the administrative process"). See also *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (specific statute not to be controlled or nullified by general one). As this Court has explained, federal courts should adopt the "permissible meaning" of an ambiguous statute "which fits most logically and comfortably into the body of both previously and subsequently enacted law," not because that precise "accomodative meaning" was necessarily "what the lawmakers must have had in mind," but because it is the role of the federal courts "to make sense rather than nonsense out of the *corpus juris*." *West Virginia Univ. Hosp., Inc.* v. *Casey*, 499 U.S. 83, 100-101 (1991). In this case, the D.C. Circuit needlessly made the law self-contradictory, rejecting a persuasive construction of Section 525 that accommodates bankruptcy law to the specific requirements of the license allocation regime Congress established in Section 309(j).

a. Section 525 of the Bankruptcy Code provides that, with certain exceptions, "a governmental unit may not deny, revoke, suspend, or refuse to renew a license" to "a person that is or has been a debtor under this title * * * solely because such bankrupt or debtor * * * has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. 525(a). The statutory language is clear—a governmental agency may not revoke (or refuse to issue) a license because a debtor in bankruptcy proceedings "has not paid a debt that is dischargeable" under the Bankruptcy Code; thus, if the debt is *non*dischargeable, Section 525's limitations do not apply. See, *e.g.*, *Johnson* v. *Edinboro State College*, 728 F.2d 163, 165 (3d Cir. 1984); 4 L. King, *Collier on Bankruptcy*

¶ 525.02, at 525-5 (15th ed. 2001). Moreover, the revocation of (or refusal to issue) the license must be "solely because" of the failure to pay a dischargeable debt; if the revocation has a regulatory purpose distinct from the mere fact that a debt remained unpaid, it is not proscribed. Neither of those two conditions to Section 525's applicability was met in this case.

First, because respondents' payment obligations were express regulatory conditions on respondents' right to hold the spectrum licenses, they were not dischargeable in bankruptcy within the meaning of Section 525. Pet. App. 388a; 47 C.F.R. 1.2110(e)(4) (1997). As the Second Circuit explained, the "willingness and ability" of respondents "to pay more than [their] competitors" in the spectrum auction was "the basis on which [the FCC] decided to grant the [l]icenses" to them. Pet. App. 234a. Their "inability to follow through on [their] financial undertakings" thus "indicated that under the predictive mechanism created by Congress to guide the FCC," respondents were "not the applicant[s] most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." *Ibid.* "It meant, in regulatory terms, that [respondents were] not entitled to the [l]icenses." *Ibid.* Accordingly, in keeping with the Bankruptcy Code's general preservation of regulatory obligations, see pp. 25-26, *infra*, the Second Circuit held that the bankruptcy and district courts "were utterly without the power to order that [respondents] be allowed to retain" their licenses without fulfilling their regulatory payment obligations. Pet. App. 236a. So long as respondents held the licenses, their obligation to pay their winning bids in full and on time could not be modified in bankruptcy and thus were not "dischargeable" in bankruptcy within the meaning of Section 525.[9]

[9] In that respect, the Second Circuit properly distinguished between the FCC's *regulatory* powers (upon which bankruptcy law does not intrude) and its *financial* interests (which may be adjusted in bankruptcy). As that court explained, the fact that bankruptcy courts cannot adjust regulatory payment obligations does not preclude them from adjusting any payment obligations that are purely financial in nature, Pet. App. 236a & n.11, such as those that would persist *after* surrender of the licenses. See *id.* at 237a ("If the [l]icenses are returned to the FCC, the bankruptcy court may resolve resulting financial claims that the FCC has against NextWave as it would the claims of any government agency seeking to recover a regulatory penalty or an obligation on a debt."). The D.C. Circuit's decision, in contrast, fails to distinguish between the two sets of interests, and thus erroneously treats regulatory obligations as subject to modification in bankruptcy.

The D.C. Circuit's contrary conclusion does not withstand scrutiny. According to that court, the Second Circuit held that "insofar as timely payment was a condition for license retention, the *bankruptcy court* had no authority to modify it," Pet. App. 42a, but "never decided that a court of competent jurisdiction (such as [the D.C. Circuit]) could not modify or *discharge it under section 525*." *Ibid.* (emphasis added). Contrary to the D.C. Circuit's assumption, however, Section 525 does not itself authorize *any* court to *discharge* debts; it is a prohibition on government conduct, not an authorization for judicial discharge of obligations.

Moreover, the D.C. Circuit possesses no authority to "discharge" debts under any provision of the Bankruptcy Code. Section 525, by its terms, applies only if the debts are "dischargeable *in the case under this title*," *i.e.*, in bankruptcy proceedings under the Code. 11 U.S.C. 525(a) (emphasis added). For cases like this one under Chapter 11, there is but one discharge provision, Section 1141(d)(1), which provides that confirmation of the plan of reorganization "discharges the debtor from any debt that arose before the date of confirmation." 11 U.S.C. 1141(d)(1). The D.C. Circuit is not a court empowered to confirm a plan of reorganization under Chapter 11 of the Bankruptcy Code, and thus cannot "discharge" the debtor from a debt under Chapter 11. To the contrary, "original and exclusive" jurisdiction over "all cases under title 11" is vested in the district courts, 28 U.S.C. 1334(a), which may, pursuant to 28 U.S.C.

157(a), refer such cases to "the bankruptcy judges for the district." See also 28 U.S.C. 157(b)(1), (b)(2)(L) ("confirmations of plans" is among the "core proceedings" that "[b]ankruptcy judges" may "hear and determine").

Second, the D.C. Circuit erred in concluding that license cancellation under the Commission's rules occurs "solely because" of the debtor's failure to pay "a debt" dischargeable in bankruptcy. Pet. App. 45a. Respondents' licenses canceled because respondents breached a fundamental regulatory condition of their licenses. The fact that the cancellation would not have occurred but for the failure to pay does not in itself satisfy the terms of Section 525 where, as here, payment serves a regulatory as well as financial function. A "but for" cause is not necessarily a "sole" cause. See *United States* v. *Dyer*, 216 F.3d 568, 570 (7th Cir. 2000) (Posner, J.) ("'But for' causation is a very weak sense of causation," that is "poles apart from 'sole cause,' as innumerable cases * * * make clear.") (citing cases).

The purpose of the auctions at issue in this case was to select a single applicant, to the exclusion of all others, to use particular spectrum to serve the public. The bids were required and collected not for their own sake but rather because they are the means by which the Commission ensures that the prospective licensee will best use the license in the public interest. Because the bid is the central regulatory mechanism used to identify the "best" licensee from among competing applicants, the bidder's failure to make full and timely payment is fatal to its implicit representation that it is the "best" of the potential licensees. The failure to pay signifies that the bidder's original representation that it was willing and able to pay more than the other bidders no longer holds true, and thus that the basis on which the FCC decided to issue the license no longer holds true either. As a result, cancellation does not occur "solely because" of respondents' failure to pay a "debt." It occurs

because of the breach of a regulatory condition central to the FCC's identification of the applicant as the proper licensee.

The obvious purpose of Section 525 is to enable one who otherwise satisfies all regulatory requirements for a business or professional license to continue, in competition with others, to conduct that business notwithstanding failure to pay a debt. For that reason, Section 525 is entitled "Protection against *discriminatory* treatment." (Emphasis added.) But Section 525 does not purport to force an agency to give an exclusive license to a business that fails to meet the key regulatory requirement for maintaining the license. By permitting respondent to keep its licenses and exclude all others from using that spectrum despite failure to meet a central condition of its license, the D.C. Circuit converted Section 525 from a bar on discrimination against debtors into a rule requiring discrimination in their favor.

b. The D.C. Circuit's construction of Section 525 also places that provision at odds with the structure of the Bankruptcy Code as a whole. The Bankruptcy Code generally exempts regulatory action from the Code's provisions. See, *e.g.*, 11 U.S.C. 362(b)(4) (1999 & Supp. V 1999) (regulatory and police actions exempted from automatic stay). This Court thus has repeatedly recognized that the Bankruptcy Code should not be construed to prevent the government from pursuing its non-creditor, regulatory interests. See, *e.g.*, *Board of Governors* v. *MCorp Fin.*, 502 U.S. 32, 40 (1991); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envt'l Prot.*, 474 U.S. 494, 507 (1986). It is accordingly sensible to read Section 525 as permitting agency enforcement of license conditions designed to achieve regulatory goals by holding such conditions to be not "dischargeable in" bankruptcy within the meaning of Section 525.

The D.C. Circuit's contrary construction of Section 525, under which bankruptcy law governs the essentially regulatory question of who will hold a radio spectrum license, creates an unprecedented expansion of bankruptcy law into

the domain of agency authority. Under the D.C. Circuit's decision, the effect of a failure to meet a fundamental regulatory condition in a radio spectrum license is *not* determined under rules established by the FCC in pursuit of the public interest. Instead, that failure becomes a matter of bankruptcy law designed to regulate debtor-creditor relations, divorced from the specific and unique public interest concerns of the Communications Act and the FCC's expertise. Nothing in either the Communications Act or the Bankruptcy Code supports, much less compels, that dramatic displacement of FCC authority in this area.

In fact, Section 309(j) proscribes it. When Congress established auctions as a mechanism for issuing spectrum licenses, it provided that "*[n]othing* * * * in the use of competitive bidding, *shall diminish* the authority of the [FCC] under other provisions of this chapter to regulate or *reclaim* spectrum licenses." 47 U.S.C. 309(j)(6)(C) (emphases added). It further provided that the FCC's use of auctions under Section 309(j) may not "be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to [competitive bidding]." 47 U.S.C. 309(j)(6)(D). See also 47 U.S.C. 301 ("[N]o [FCC spectrum] license shall be construed to create any right, beyond the terms, conditions, and periods of the license."). Congress thus made clear that competitive bidding "alters only the licensing process, and has no effect on the requirements, obligations or privileges of the license holders." H.R. Rep. No. 111, *supra*, at 258. Yet, under the D.C. Circuit's construction, the use of competitive bidding *eliminates* the FCC's right to reclaim licenses for failure to meet fundamental license conditions specifically because the auction mechanism was used, *i.e.*, because the regulatory decision to issue the licenses had a financial component.

In light of Congress's decision to use a market-based system for allocating spectrum, that represents a significant

intrusion on the FCC's ability "to reclaim licenses," in derogation of 47 U.S.C. 309(j)(6)(C). Moreover, under the D.C. Circuit's decision, the use of competitive bidding effectively conveys additional rights to defaulting bidders—a right to retain licenses in bankruptcy despite failure to meet license conditions—that, but for the use of competitive bidding, would not exist. That result conflicts not only with the express command of Section 309(j)(6)(D), but with basic principles of bankruptcy law. See *In re Gull Air, Inc.*, 890 F.2d 1255, 1260 (1st Cir. 1989) ("The Bankruptcy Code does not create or enhance property rights of a debtor.").

Ultimately, the D.C. Circuit refused to construe Section 525 in a manner that would accommodate the FCC's regulatory regime—and Congress's goals under Section 309(j)—because Section 525 lacks a specific "regulatory purpose exception." Pet. App. 43a. That reasoning misreads Section 525. Section 525 prohibits only license revocations that occur "solely because of" the debtor's failure to pay a "debt that is dischargeable" in bankruptcy. As explained above, where the unfulfilled obligation is regulatory in nature, it is (as the Second Circuit concluded in this case) not dischargeable in bankruptcy, and revocation of the license in the event of breach is not "solely because" of the failure to pay a debt. In view of the express limits built into Section 525, Congress's failure to include a further "regulatory exception" reflects a congressional interest in avoiding redundancy.

Indeed, the legislative history of Section 525 confirms that point. See S. Rep. No. 989, 95th Cong., 2d Sess. 81 (1978) (Section 525 "does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily."); H.R. Rep. No. 595, 95th Cong., 1st Sess. 165 (1977) ("where the causes of a bankruptcy are intimately connected with the license * * * an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate

regulatory policies and take appropriate action without running afoul of bankruptcy policy"); 4 *Collier*, *supra*, ¶ 525.02, at 525-5 (where agency merely enforces nondiscriminatory financial requirement—one that is applicable whether or not a party has filed for bankruptcy—such as requiring "financial responsibility in a particular licensing process," Section 525(a) "is not applicable."). The D.C. Circuit dismissed the legislative history as inconsistent with statutory text, Pet. App. 46a, but it is only inconsistent with the text as misinterpreted by that court. If regulatory obligations are properly understood as nondischargable even when they have a financial component, the legislative history of Section 525 is fully consistent with Section 525's text— and with the more general principle that bankruptcy law does not intrude on the FCC's substantive regulatory authority.[10]

[10] In holding that "the Commission violated Section 525 of the Bankruptcy Code in canceling NextWave's licenses," the D.C. Circuit stated that it "need not consider [respondents'] remaining Bankruptcy Code arguments." Pet. App. 51a. The court of appeals at one point, however, did state that "section 362's automatic stay" may have applied because the FCC's license cancellation constituted an effort to "enforce liens against property of the estate" in violation of 11 U.S.C. 362(a)(4) and (5). See Pet. App. 40a-41a. That statement, however, is merely part of the court of appeals' analysis of the Section 525 issue, and is not an independent ground. It is, in any event, incorrect. The Bankruptcy Code provides that the automatic stay of proceedings upon the filing of a bankruptcy petition does not apply to "the commencement or continuation of an action or proceeding by a governmental unit * * * to enforce such governmental unit's or organization's police and regulatory power." 11 U.S.C. 362(b)(4) (1994 & Supp. V 1999). It is true, of course, that Section 362(b)(4) does not apply where the action at issue is an effort to "create, perfect, or enforce any lien" against property of the estate or against property of the debtor to the extent that the lien secures a pre-petition claim. See 11 U.S.C. 362(b)(4) (1994 & Supp. V 1999) (specifying that regulatory exception applies only to stays under "paragraph (1), (2), (3), or (6) of subsection (a)"). But the FCC's cancellation of the licenses was not an effort to enforce a lien against property of the estate, because cancellation enforces a regulatory requirement, and the spectrum licenses are not property, much less "property of the estate." See *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) (under the Communication Act "no person is to have anything in the nature of a property right as a result of the granting of a license."). To treat a license as conferring a *property* right to exclude others from use of the allocated spectrum is tantamount to granting a property right in the spectrum itself, which Congress has expressly precluded. See p. 2, *supra*; see also pp. 26-27, *supra* (competitive bidding does not convey additional rights to licensees). More fundamentally, the D.C. Circuit erred in attaching significance to the fact that the FCC, in addition to exercising its regulatory powers, had executed agreements giving it liens on the licenses. Pet. App. 39a-40a. Respondents' licenses canceled as a result of the Commission's exercise of its regulatory authority to implement the auction process, separate and apart from the Commission's creditor interests. Nor could the additional existence of a lien diminish the scope of the Commission's regulatory authority. In this case, the notes and security agreements by their own terms make clear that they do not substitute for, but instead supplement, the regulatory power embodied in the administrative rules and license conditions. *Id.* at 403a-404a.

3. Finally, the D.C. Circuit's decision cannot be reconciled with the Second Circuit's decision in this very case. The Second Circuit ruled that the FCC's timely payment condition fulfilled the objectives underlying the statutory auction process, "the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum," in precisely the same way as the agency's requirement that winning bids be paid in full. Pet. App. 119a. Because the "timing of NextWave's payment obligation—like the amount of it—was a subject of FCC regulation," the Second Circuit held, "[t]he bankruptcy court lacked jurisdiction to declare the Public Notice null and void on any ground: that the Public Notice violated the automatic stay, that the right to cure obviates any default, or that the government was estopped." *Id.* at 126a-127a.

The D.C. Circuit assumed that the agency's enforcement of its timely payment condition fell "within the regulatory power exception" to the automatic stay. Pet. App. 35a. Yet that court declined to distinguish between the FCC's regulatory role and its financial interests. Instead, the court ruled that, because the Commission had "chosen to create standard debt obligations as part of its licensing scheme" (*id.* at

2a), and had "enter[ed] a creditor relationship with winning bidders" (*id.* at 50a), Section 525 of the Bankruptcy Code precluded the Commission from canceling respondents' licenses, even in its regulatory role.

The Second Circuit, in contrast, squarely rejected that approach, which "turn[s] the FCC into a mere creditor," as "fundamentally mistaken." Pet. App. 235a. Instead, the court held, "[i]n granting licenses by auction, the FCC acts as creditor and regulator both." *Id.* at 244a. The agency's "regulatory function is not ended by the bankruptcy of a licensee or license claimant," the court concluded, "and as the function persists it must perforce be carried out." *Ibid.* See also note 9, *supra*. Indeed, the D.C. Circuit's analysis and its dismissive attitude toward the impact of its decision on the FCC's regulatory goals under Section 309(j) is difficult to distinguish from the bankruptcy court reasoning the Second Circuit twice rejected. See pp. 7-10, *supra*. That unseemly conflict between the approach taken by the Second and D.C. Circuits in this very case—as well as the consequent divergence in results—weigh strongly in favor of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
*Acting Solicitor General**
LAWRENCE G. WALLACE
Deputy Solicitor General
JEFFREY A. LAMKEN
Assistant to the Solicitor General
WILLIAM KANTER
JACOB M. LEWIS
Attorneys

JOHN A. ROGOVIN
Deputy General Counsel
DANIEL M. ARMSTRONG
JOEL MARCUS
Counsel
Federal Communications Commission

OCTOBER 2001

---

* The Solicitor General is disqualified in this case.

Supreme Court, U.S.
FILED

01 653 OCT 19 2001

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC. AND NEXTWAVE POWER PARTNERS INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI (VOLUME I)

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
LAWRENCE G. WALLACE
Deputy Solicitor General
JEFFREY A. LAMKEN
Assistant to the Solicitor General
WILLIAM KANTER
JACOB M. LEWIS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOHN A. ROGOVIN
Deputy General Counsel
DANIEL M. ARMSTRONG
JOEL MARCUS
Counsel
Federal Communications Commission
Washington, D.C. 20507

TABLE OF CONTENTS
(Volume I)

	Page
Appendix A (Opinion of the D.C. Circuit, 254 F.3d 130 (June 22, 2001))	1a
Appendix B (Reconsideration Order of the Federal Communications Commission, 15 FCC Rcd 17,500 (Sept. 6, 2000))	52a
Appendix C (Public Notice of the Federal Communications Commission, 15 FCC Rcd 693 (Jan. 12, 2000))	96a
Appendix D (Opinion of the Second Circuit on Mandamus, 217 F.3d 125 (May 25, 2000))	102a
Appendix E (Opinion of the Bankruptcy Court, 244 B.R. 253 (S.D.N.Y. Jan. 31, 2000))	134a
Appendix F (Opinion of the Second Circuit, 200 F.3d 43 (Dec. 22, 1999))	213a
Appendix G (Opinion of the District Court, 241 B.R. 311 (S.D.N.Y. July 27, 1999))	254a
(Volume II)	
Appendix H (Opinion of the Bankruptcy Court, 235 B.R. 305 (S.D.N.Y. June 22, 1999))	273a
Appendix I (Opinion of the Bankruptcy Court, 235 B.R. 314 (S.D.N.Y. June 16, 1999))	293a
Appendix J (Opinion of the Bankruptcy Court, 235 B.R. 277 (S.D.N.Y. May 12, 1999))	301a
Appendix K (Opinion of the Bankruptcy Court, 235 B.R. 272 (S.D.N.Y. Feb. 16, 1999))	359a
Appendix L (Opinion of the Bankruptcy Court, 235 B.R. 263 (S.D.N.Y. Dec. 7, 1998))	369a
Appendix M (Radio Station Authorization (FCC issued Jan. 3, 1997))	387a

Table of Contents—Continued Page

Appendix N (Installment Payment Plan Note (dated Jan. 3, 1997)) 389a
Appendix O (Security Agreement Between NextWave Personal Communications, Inc. and the Federal Communications Commission (dated Jan. 3, 1997)) 401a
Appendix P (Statutory and Regulatory Provision):
11 U.S.C. 362 (2000) 417a
11 U.S.C. 525 (2000) 427a
28 U.S.C. 1334 ..... 429a
47 U.S.C. 309(j) (1994) 431a
47 U.S.C. 309(j) (2000) 448a
47 C.F.R. 1.2110 (1997) 470a
47 C.F.R. 1.2110 (1998) 482a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-1402 and 00-1403

NEXTWAVE PERSONAL COMMUNICATIONS INC. AND NEXTWAVE POWER PARTNERS INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

BELLSOUTH CORPORATION, ET AL., INTERVENORS

[Argued: March 15, 2001
Decided: June 22, 2001]

On Petition for Review and Notice of Appeal of Orders of the Federal Communications Commission.

Before: SENTELLE, TATEL and GARLAND, Circuit Judges.

Opinion for the Court filed by Circuit Judge TATEL.

TATEL, Circuit Judge:

This case concerns the extent to which the Bankruptcy Code limits a federal agency—here, the Federal Communications Commission—acting to implement the provisions of its own statute. Seeking to comply with its statutory duty to ensure small business participation

in auctions of broadband PCS licenses, the Commission allowed winning bidders to pay for their licenses in installments. As part of this scheme, the Commission took and perfected security interests in the licenses, and provided for license cancellation should a bidder fail to make timely payments. When appellants, winning bidders on several licenses, declared bankruptcy and ceased making payments, the Commission canceled their licenses. Applying the fundamental principle that federal agencies must obey all federal laws, not just those they administer, we conclude that the Commission violated the provision of the Bankruptcy Code that prohibits governmental entities from revoking debtors' licenses solely for failure to pay debts dischargeable in bankruptcy. The Commission, having chosen to create standard debt obligations as part of its licensing scheme, is bound by the usual rules governing the treatment of such obligations in bankruptcy.

I

In 1993, Congress amended the Communications Act of 1934 to authorize the Federal Communications Commission to award spectrum licenses "through a system of competitive bidding." 47 U.S.C. § 309(j)(1). In "identifying classes of licenses and permits to be issued by competitive bidding," and in "designing the methodologies" for such bidding, Congress directed the Commission to promote several objectives, including "the development and rapid deployment of new technologies, products and services," the "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use," and the "efficient and intensive use of the electromagnetic spectrum." *Id.* § 309(j)(3). Congress also directed the Commission to

"promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by . . . disseminating licenses among a wide variety of applicants, including small businesses [and] rural telephone companies." *Id.* § 309(j)(3)(B). To further this last goal, Congress directed the Commission to "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments . . . or other schedules or methods." *Id.* § 309(j)(4)(A).

Acting pursuant to this statute, the Commission adopted rules to auction licenses for "broadband PCS" —"personal communications services in the 2 GHz band." *In re Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 5532 ¶ 1 (1994). The Commission expected broadband PCS to "provide new mobile communications capabilities" through "a new generation of communications devices" including "small, lightweight, multi-function portable phones, portable facsimile and other imaging devices, new types of multi-channel cordless phones, and advanced paging devices with two-way data capabilities." *Id.* ¶ 3. The Commission "determined that the use of competitive bidding to award broadband PCS licenses, as compared with other licensing methods, would speed the development and deployment of new services to the public and would encourage efficient use of the spectrum," as required by statute, since "auctions would generally award licenses quickly to those parties who value them most highly and who are therefore most likely to introduce service rapidly to the public." *Id.* ¶ 5. The Commission expected the PCS license auction to "constitute the largest auction of public assets in American

history," recovering "billions of dollars for the United States Treasury," and thus fulfilling another statutory mandate. *Id.* ¶ 1.

As directed by Congress, the Commission adopted a variety of measures to promote small business ownership of PCS licenses, including setting aside two blocks of licenses, the "C" and "F" Blocks, for bidding by entities with annual gross revenues and total assets below specified amounts. *Id.* ¶ 12. Especially relevant to this case, the Commission allowed "most successful bidders within the [C and F Blocks] to pay for their licenses in installments." *Id.* ¶ 16. Observing that "the primary impediment to participation [in license auctions] by designated [small business] entities is lack of access to capital," *id.* ¶ 10, the Commission concluded that "installment payments are an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for the auctioned spectrum." *Id.* ¶ 135. "By allowing payment in installments," the Commission stated, "the government is in effect extending credit to licensees, thus reducing the amount of private financing needed prior to and after the auction." *Id.* ¶ 136. The Commission also announced that "[t]imely payment of all installments will be a condition of the license[] grant and failure to make such timely payment will be grounds for revocation of the license." *Id.* ¶ 138.

In 1995, a group of former telecommunications executives founded NextWave Personal Communications Inc. and NextWave Power Partners Inc. (collectively "NextWave"), appellants in this case, for the purpose of bidding on PCS licenses and operating a personal communications service. NextWave's founders hoped

the company would become a "carrier's carrier," selling wireless services and airtime wholesale. Appellants' Opening Br. at 5. At C Block auctions in May and July, 1996, NextWave bid $4.74 billion in total, winning sixty-three licenses. The company made a $474 million down payment. Several months later, the Commission granted NextWave its licenses, took a security interest in each, and filed UCC financing statements to perfect its claims. The security agreements gave the Commission "a first lien on and continuing security interest in all of the Debtor's rights and interest in [each] License." *Security Agreement between NextWave and FCC* ¶ 1 (January 3, 1997). The licenses included the following language: "This authorization is conditioned upon the full and timely payment of all monies due pursuant to . . . the terms of the Commission's installment plan as set forth in the Note and Security Agreement executed by the licensee. Failure to comply with this condition will result in the automatic cancellation of this authorization." FCC, *Radio Station Authorization for Broadband PCS* 2 (issued to NextWave January 3, 1997).

After the Commission awarded the C Block licenses, several successful bidders, including NextWave, experienced difficulty obtaining financing, having agreed to pay on average almost three times what winning bidders in the prior A and B Block auctions had paid, and several times what winning bidders in subsequent D, E, and F block auctions paid. In response, the Commission suspended installment payment obligations for C Block licensees, and then issued two *Restructuring Orders*, offering a variety of revised financing options that allowed C Block licensees to surrender some or all of their licenses for full or partial for-

giveness of their outstanding debt. *See In re Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Communications Servs. Licensees, Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16436 ¶¶ 6, 32-69 (1997); *In re Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Communications Servs. Licensees, Order on Recons. of the Second Report and Order*, 13 FCC Rcd 8345 ¶¶ 11-15 (1998); *see also In re Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Communications Servs. Licensees, Second Order on Recons. of the Second Report and Order*, 14 FCC Rcd 6571 (1999). None of the restructuring options allowed licensees to keep any of their licenses for less than the full bid price. *See In re Amendment of the Comm'n's Rules, Order on Recons.*, 13 FCC Rcd 8345 ¶ 8. According to the Commission, these options balanced the goals of introducing new spectrum services rapidly and promoting small business participation in PCS auctions against the need to maintain auction integrity and treat unsuccessful bidders fairly. *See In re Amendment of the Comm'n's Rules*, 12 FCC Rcd 16436 ¶¶ 1-5; *see also U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000) (upholding restructuring scheme). The Commission gave licensees until June 8, 1998 to elect a restructuring option, and until July 31, 1998 to resume installment payments. *Public Notice, Wireless Telecommunications Bureau Announces June 8, 1998 Election Date*, 13 FCC Rcd 7413 (1998). It set October 29, 1998 as the last date it would accept late installment payments. *Id.*

On June 8, 1998, after failing to obtain stays of the election deadline from the Commission and this court,

NextWave filed for Chapter 11 bankruptcy protection in New York. *See NextWave Pers. Communications, Inc. v. FCC* (*In re NextWave Pers. Communications, Inc.*), 235 B.R. 263, 267 (Bankr. S.D.N.Y. 1998) ("*NextWave I*"). Because the Bankruptcy Code is central to this case, we pause to summarize certain relevant provisions. Section 362, the "automatic stay" provision, provides that petitions filed under Chapter 11 "operate[] as a stay, applicable to all entities" of a variety of acts to collect on or enforce debts. 11 U.S.C. § 362(a). Subsection 362(a)(3) stays "any act to obtain possession of property of [an] estate . . . or to exercise control over property of the estate," *id.* § 362(a)(3), but subsection 362(b)(4) provides an exception to 362(a)(3) for "governmental unit[s]" acting to "enforce" their "regulatory power." *Id.* § 362(b)(4). Subsections 362(a)(4) and (5) stay "any act to create, perfect, or enforce any lien against property of the estate" or of the debtor. *Id.* § 362(a)(4), (5). The regulatory power exception does not apply to these subsections. *See id.* § 362(b)(4). In general, an automatic stay lasts only until a bankruptcy case is closed or dismissed, or until the bankruptcy court grants or denies a discharge. *See id.* § 362(c)(2). Other provisions of the Code, however, offer more permanent relief. Section 525 prohibits "governmental unit[s]" from "revok[ing]" a bankrupt's or debtor's license "solely because such bankrupt or debtor . . . has not paid a debt that is dischargeable . . . under this title." *Id.* § 525(a). Finally, under section 1123, 11 U.S.C. § 1123, bankrupts (subject to court approval) have the power to "cure" their defaults —that is, to "tak[e] care of the triggering event and return[] to pre-default conditions." *Di Pierro v. Taddeo* (*In re Taddeo*), 685 F.2d 24, 26-27 (2d Cir. 1982).

After declaring bankruptcy, and in line with the "normal deferment of the payment of preorganization claims until their disposition can be made part of a plan of reorganization," *In re Penn Cent. Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972), NextWave made no further payments on its licenses. Nor did it seek permission to make installment payments under the "necessity of payment" doctrine, which some courts have invoked to authorize payment of prepetition claims "if such payment [is] essential to the continued operation of the debtor." *In re Just For Feet, Inc.*, 242 B.R. 821, 825 (Bankr. D. Del. 1999). NextWave sought no such authorization, it explains, because "the Code's automatic stay provision generally prevents even government creditors from enforcing payment obligations or seizing assets of the estate," and thus it had "no reason to believe it would be required to make the October 1998 installment payment while in bankruptcy." Appellants' Opening Br. at 10 & n.8.

Instead, NextWave alleged in the bankruptcy court that its $4.74 billion license fee obligation was avoidable under section 544 of the Bankruptcy Code as a "fraudulent conveyance" since the company had not received reasonably equivalent value in exchange for incurring the obligation: by the time the Commission actually conveyed the licenses to NextWave, the company claimed, their value had declined to less than $1 billion. *NextWave I*, 235 B.R. at 269; *see also NextWave Pers. Communications, Inc. v. FCC* (*In re NextWave Pers. Communications*), 235 B.R. 277, 290 (Bankr. S.D.N.Y. 1999) ("*NextWave III*"). Ruling on this claim, the bankruptcy court began by addressing its jurisdiction. It acknowledged that under 47 U.S.C. § 402, it lacked jurisdiction to "enjoin[], review[], assess[] damages for

or otherwise adjudicat[e] the consequences of the conduct of [a] Federal agency acting within the scope of its Congressional mandate." *NextWave I*, 235 B.R. at 268. It nevertheless asserted jurisdiction over the case because, in its view, NextWave's claim against the Commission did not involve "any regulatory conduct on the part of the FCC," but rather concerned solely the debtor-creditor relationship between the FCC and NextWave. *Id.* at 269; *see also NextWave Pers. Communications, Inc. v. FCC (In re NextWave Pers. Communications)*, 235 B.R. 305, 314 (Bankr. S.D.N.Y. 1999) ("*NextWave IV*"). Nothing in the Communications Act, the court said, suggests that a bankruptcy court lacks jurisdiction to implement the provisions of the Code "which affect [the Commission] *as a creditor*." *NextWave I*, 235 B.R. at 269-70. Turning to the merits, the court found that NextWave's winning bid exceeded the fair market value of its licenses at the time they were conveyed, *NextWave III*, 235 B.R. at 304, and avoided $3.72 billion of NextWave's $4.74 billion license fee obligation, ruling in effect that the company could keep its licenses for the reduced price of $1.02 billion. *See NextWave IV*, 235 B.R. 305, *aff'd NextWave Pers. Communications, Inc. v. FCC (In re NextWave Pers. Communications, Inc.)*, 241 B.R. 311, 321 (S.D.N.Y. 1999); *see also In re NextWave Pers. Communications, Inc.*, 235 B.R. 314, 316 (Bankr. S.D.N.Y. 1999) ("*NextWave V*").

The Second Circuit reversed, making four key points. First, it emphasized that the Commission's action, contrary to the bankruptcy court's finding, *was* regulatory: the Commission explicitly "made 'full and timely payment of the winning bid' a regulatory condition for obtaining and retaining a spectrum license," and this

condition had a purpose "related directly to the FCC's implementation of the spectrum auctions." *FCC v. NextWave Pers. Communications, Inc. (In re NextWave Personal Communications)*, 200 F.3d 43, 52 (2d Cir. 1999) (quoting 47 C.F.R. § 24.708). The Second Circuit explained the Commission's regulatory purpose as follows:

> [The FCC] decided that it would be 'critically important to the success of our system of competitive bidding . . . [to] provide strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and re-auction.' . . . [Since] 'designated entities' such as NextWave . . . were allowed to pay in installments[,] [i]t was important for the functioning of the auction . . . that the FCC's default rules and penalties be enforceable, because the FCC relied upon them as a substitute for conducting the 'detailed credit checks' and other forms of due diligence that otherwise would be necessary to ensure . . . that the licenses would be awarded to the appropriate entities.

Id. at 52-53 (quoting *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348 ¶¶ 197, 194, 198 (1994)).

Second, the court held that the bankruptcy court had interfered with this regulatory purpose by avoiding a substantial portion of NextWave's bid price, thus allowing the company to keep the licenses for a reduced price. *Id.* at 55. This, the Second Circuit held, the

bankruptcy court had no jurisdiction to do: "Because jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals, *see* . . . 47 U.S.C. § 402, the bankruptcy and district courts lacked jurisdiction to decide the question of whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses." *In re NextWave*, 200 F.3d at 54.

Third, the Second Circuit found that besides interfering with the Commission's licensing function through a collateral proceeding, the bankruptcy court had in effect attempted to exercise that function itself—again exceeding its jurisdiction:

> By holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion, the bankruptcy . . . court[] impaired the FCC's method for selecting licensees by effectively awarding the Licenses to an entity that the FCC determined was not entitled to them. In so doing [it] exercised the FCC's radio-licensing function. . . . [E]ven if the bankruptcy . . . court[] [was] right in concluding that granting the Licenses at a small fraction of NextWave's original successful bid price best effectuated the [Federal Communication Act's] goals, [it was] utterly without the power to order that NextWave be allowed to retain them for that reason or on that basis.

Id. at 55 (internal citations omitted).

Finally, notwithstanding its conclusion that the bankruptcy court lacked jurisdiction to change the conditions under which NextWave could retain its licenses, the Second Circuit acknowledged that the bankruptcy

court might well have jurisdiction over NextWave's underlying debts themselves: "To the extent that the financial transactions between [the FCC and NextWave] do not touch upon the FCC's regulatory authority, they are indeed like the obligations between ordinary debtors and creditors." *Id.* Pointing out that NextWave "remain[ed] a debtor in bankruptcy," and that "[i]f the Licenses [were] returned to the FCC, the bankruptcy court [might] resolve resulting financial claims that the FCC has against NextWave," *id.* at 56, the Second Circuit reviewed the merits of the bankruptcy court's avoidance decision and concluded that NextWave should not be allowed to avoid $3.72 billion of its debt under the Bankruptcy Code. *Id.* at 46, 62.

Immediately following the Second Circuit reversal, NextWave prepared a new plan of reorganization that provided for a single lump sum payment to satisfy its entire $4.3 billion outstanding obligation to the Commission, including interest and late fees. The Commission objected to the plan, alleging that NextWave's licenses had automatically canceled when the company missed its first payment deadline in October 1998. *See In re Pub. Notice DA 00-49, Auction of C and F Block Broadband PCS Licenses, Order on Reconsideration,* FCC 00-335 ¶ 7 (Sept. 6, 2000). Simultaneously, the Commission issued a public notice announcing reauction of NextWave's licenses. The notice stated that the licenses were "available for auction under the automatic cancellation provisions" of the Commission's regulations. *Public Notice, Auction of C and F Block Broadband PCS Licenses,* DA 00-49, 15 FCC Rcd 693 (2000).

The dispute then returned to the bankruptcy court, which declared the Commission's cancellation of NextWave's licenses "null and void" as a violation of various provisions of the Bankruptcy Code, including the automatic stay provisions of section 362(a). *In re NextWave Pers. Communications, Inc.*, 244 B.R. 253, 257-58, 267-68 (Bankr. S.D.N.Y. 2000)("*NextWave VI*"). In reaching this conclusion, the bankruptcy court acknowledged that under the Second Circuit's ruling, it lacked jurisdiction to interfere with the Commission's regulatory acts. *Id.* at 260-61. It also acknowledged that it was bound by the Second Circuit's decision that "a regulatory purpose was implicit in the 'full payment requirement' in the FCC regulations." *Id.* at 270. As the bankruptcy court saw it, however, the "regulatory objective" behind the full payment requirement had been "fulfilled in the debtors' modified Plan . . . to pay the entire $4.3 billion outstanding . . . in a lump sum upon confirmation." *Id.* The cancellation of NextWave's licenses, in contrast, was a response to the company's failure to make a *timely* payment, and this requirement, the court reasoned, was "purely economic," having to do with "the time value of money." *Id.* "[T]he economic consequence of delay," it stated, "will be fully cured by payment in full of all applicable interest, penalties and late fees. . . ." *Id.* Further explaining its view that the timely payment requirement lacked a regulatory purpose, the bankruptcy court discussed at length its reasons for believing that canceling licenses for failure to make a timely payment "conflict[ed] with the spirit and the letter of the agency's governing statute"—namely, section 309(j) of the Communications Act. *Id.* at 281; *see also id.* at 282-83, 271. Concluding that the Commission "has not and cannot articulate any regulatory interest entailed in the

'timely payment' requirement," *id.* at 270, the court ruled that the Second Circuit's prior decision did not preclude it from declaring the cancellation void. *Id.* at 283.

Again, the Second Circuit reversed. *In re FCC*, 217 F.3d 125 (2d Cir. 2000). Granting a mandamus petition filed by the Commission, the court held that "[t]here can be little doubt that if full payment is a regulatory condition, so too is timeliness." *Id.* at 136. In the court's view, "the regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time." *Id.* at 135. The conclusion that the Commission's decision "was in fact regulatory," the court went on, was "reinforced" by the fact that the bankruptcy court, in deciding that the license cancellation lacked a regulatory purpose, had explained at length that the cancellation and re-auction were contrary to the purposes of section 309(j) of the Communications Act. *Id.* at 136. But according to the Second Circuit, these discussions, rather than explaining why the re-auction decision was not regulatory, explained why, under the Communications Act, it was arbitrary, and such a determination, the Second Circuit pointed out, was "outside the jurisdiction of the bankruptcy court." *Id.* "[A] regulatory condition is a regulatory condition even if it is arbitrary. It is for the FCC to state its conditions of licensure, and for a court with power to review the FCC's decisions to say if they are arbitrary or valid." *Id.* at 137.

As a consequence, the Second Circuit concluded that the bankruptcy court had both violated the appellate

court's earlier mandate and exceeded the bankruptcy court's own jurisdiction. *Id.* "The bankruptcy court," the Second Circuit stated, "construes our mandate to mean no more than that the bankruptcy court may not abrogate the full-payment requirement on the basis of a fraudulent conveyance holding." *Id.* at 139. But this understanding "under-reads our previous opinion." *Id.* That opinion "clearly instruct[ed] the bankruptcy court to refrain from interfering with the licensing decisions of the FCC," *id.*, and as the Second Circuit saw it, this is exactly what the bankruptcy court did in declaring the license cancellation null and void. In addition, because "[e]xclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals" under 47 U.S.C. § 402, *In re FCC*, 217 F.3d at 139, the Second Circuit found that the bankruptcy court's license cancellation holding exceeded that court's jurisdiction. *Id.* at 141. The court also noted that "NextWave remains free to pursue its challenge to the FCC's regulatory acts" in another forum, pointing out that the company had already filed "protective notices of appeal" in this court. *Id.* at 140-41.

After losing in the Second Circuit, NextWave filed a petition with the Commission, requesting reconsideration of the license cancellation. Denying the petition, the Commission noted first that the public notice of reauction "was not an order or action of the Commission . . . canceling NextWave's licenses." *Order on Reconsideration*, FCC 00-335 ¶ 10. Rather, "[p]ursuant to [Commission] rules, the licenses canceled automatically" after NextWave failed to make its first installment payment. *Id.* The Commission thus concluded that NextWave's petition was "late" and its challenge to the reauction notice "procedurally defec-

tive." *Id.* "Nevertheless, because of the importance of the issues raised in NextWave's petition," *id.*, the Commission went on to address the company's challenge to the automatic cancellation. The Commission rejected NextWave's arguments that the cancellation was arbitrary and capricious and barred by estoppel and waiver, *id.* ¶¶ 11-33, and found that the company's Bankruptcy Code arguments, having been "summarily rejected by the Second Circuit," were "precluded under the doctrine of res judicata." *Id.* ¶ 26.

NextWave now challenges the Commission's decision on two basic grounds. First, it claims that the license cancellation is "patently unlawful," Appellants' Opening Br. at 16, under the provisions of the Bankruptcy Code described earlier: the anti-discrimination provision (section 525), the automatic stay provision (section 362), and the provision of the Code allowing debtors to "cure" their defaults (section 1123). Second, citing our decision in *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 631 (D.C. Cir. 2000), where we held that an agency may not "sanction a company for its failure to comply with regulatory requirements" without first providing "fair notice" of those requirements, NextWave argues that even if the license cancellation is not barred by the Bankruptcy Code, it is invalid because the Commission failed to provide adequate notice that the timely payment regulations apply to Chapter 11 debtors. The Commission, supported by Intervenors (the Cellular Telecommunications Industry Association and several telecommunications companies) defends its decision.

II

We begin with three threshold issues. Does our jurisdiction in this case arise from 47 U.S.C. § 402(a) or 402(b)? Was NextWave's challenge to its license cancellation timely? And are NextWave's Bankruptcy Code arguments barred by res judicata? We consider each question in turn.

Jurisdiction

NextWave has filed both a petition for review under section 402(a) and a notice of appeal under section 402(b) of the Communications Act. Section 402(a) provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought" in a court of appeals. *See* 47 U.S.C. § 402(a) (cross-referencing 28 U.S.C. § 2342(1)). Section 402(b), in contrast, provides:

> Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia . . . [b]y the holder of any construction permit or station license which has been modified or revoked by the Commission.

Id. § 402(b). Acknowledging that we have previously found these two provisions mutually exclusive, *see Friedman v. FCC*, 263 F.2d 493, 494 (D.C. Cir. 1959), NextWave asks us to "dismiss the filing that relies on the incorrect jurisdictional provision." Appellants' Opening Br. at 1.

In *Mobile Communications Corp. of America v. FCC*, we decided that the term "station license" in section 402(b) encompasses PCS licenses. *See* 77 F.3d 1399, 1403 (D.C. Cir. 1996); *see also* 47 U.S.C. § 153(42) (defining "station license" as "that instrument of authorization required . . . for the use or operation of apparatus for transmission of energy, or communications, or signals by radio"); *id.* § 153(33) (defining "communication by radio" as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds"). Given this, we think section 402(b)'s plain language, permitting appeal by "the holder of any . . . station license which has been . . . revoked by the Commission," covers this case. *Cf. Cook, Inc. v. United States*, 394 F.2d 84, 86 n.4 (7th Cir. 1968) ("'The language of [subsection 402(b)], when considered in relation to that of subsection (a) . . . would make clear that judicial review of all cases involving the exercise of the Commission's radio-licensing power is limited to [the United States Court of Appeals for the District of Columbia Circuit].'") (quoting S. REP. NO. 82-44, at 11 (1951)); *In re FCC*, 217 F.3d at 140-41. Even if the Commission did not formally "revoke" NextWave's licenses, that is certainly the effect of the license cancellation: the licenses once assigned to NextWave are now being re-auctioned to other bidders. *Cf. In re FCC*, 217 F.3d at 140 n.10. We therefore dismiss the section 402(a) petition and proceed with the section 402(b) appeal.

Timeliness

Section 402(c) of the Communications Act requires appeals under section 402(b) to be filed "within thirty days from the date upon which public notice is given of

the decision or order complained of." 47 U.S.C. § 402(c). The "decision" NextWave seeks to challenge is the Commission's cancellation of its licenses, but the formal Commission action it actually appeals is the public notice of re-auction, which itself cancels no licenses, but rather announces in passing that the company's licenses canceled automatically at an earlier date. *Order on Reconsideration*, FCC 00-355 ¶ 10.

The Commission acknowledges that "in some instances, it may be proper for a party to challenge the Commission's public notices that establish or deny rights." *Id.* Joined by Intervenors, however, it argues that NextWave's challenge to the license cancellation policy is untimely. Intervenors claim that NextWave should have challenged the policy when its licenses were issued, since the licenses themselves stated explicitly that they were conditioned on timely payment, and as we have held, "[a]cceptance of a license constitutes accession to all [license] conditions." *P&R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984). Alternatively, both Intervenors and the Commission suggest that NextWave should have challenged the automatic cancellation rule during the *Restructuring Order* proceedings because during those proceedings, the Commission considered objections to its original installment payment plan (including some objections based on the Bankruptcy Code), revised the plan, and ultimately reaffirmed the timely payment requirement. Intervenors' Br. at 3; *see also, e.g., Order on Recons. of the Second Report and Order*, 13 FCC Rcd 8345 ¶ 24. Having failed to challenge the automatic cancellation rule at one of these earlier dates, they argue, NextWave cannot do so now because orders denying reconsideration do not re-open matters that should

have been challenged previously. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 279-80, 285-86, 107 S. Ct. 2360, 96 L.Ed.2d 222 (1987).

As NextWave points out, however, we have held that "a party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule . . . even where the petitioner had notice and opportunity to bring a direct challenge within statutory time limits" but failed to do so. *Indep. Cmty. Bankers of Am. v. Bd. of Governors of the Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999). Thus even if NextWave could have challenged the automatic cancellation policy at an earlier date—either when its licenses issued or during the *Restructuring Order* proceedings—the company remained free to do so "within thirty days from the date upon which public notice [was] given" that the policy had been applied to it. 47 U.S.C. § 402(c).

According to NextWave, the thirty-day period was triggered by the public notice of re-auction because, prior to the re-auction notice, "the FCC had done *nothing whatsoever* to announce the cancellation of NextWave's licenses." Appellants' Reply Br. at 6. Because it filed a precautionary appeal with this court 30 days after the notice of re-auction, NextWave claims, its appeal was timely. Disagreeing, Intervenors argue that NextWave already had notice in October 1998 that its licenses would cancel automatically if and when it failed to make an installment payment. Thus, they argue, no further Commission statement was required to trigger the period for seeking judicial review.

Intervenors' argument assumes that notice of a future event's automatic effect (here, the explicit warning that the licenses would cancel for failure to make a

timely payment) is by itself sufficient notice to mean that the occurrence of the future event (failing to make a timely payment) will trigger the period for seeking judicial review under section 402(c). To resolve the timeliness issue in this case, however, we need not decide whether that assumption is correct, for we think it was unclear prior to the notice of re-auction that the automatic cancellation policy would apply to licensees who had filed for bankruptcy. To begin with, the Bankruptcy Code gave NextWave reason to doubt that the automatic cancellation would actually occur when the company missed its first payment in October 1998: the automatic stay triggered by a Chapter 11 filing generally blocks most efforts by creditors to exercise control over or repossess property of a debtor. *See* 11 U.S.C. § 362(a); *cf. NextWave VI*, 244 B.R. at 266-68 (finding that the automatic stay applied to NextWave's license fee obligations). Neither the Commission nor Intervenors point to any instance prior to the re-auction notice in which the Commission actually announced that NextWave's licenses had canceled despite the stay. Moreover, the Commission's own conduct suggests that it was at best unsure whether the automatic stay blocked cancellation of the company's licenses. After the bankruptcy court's fraudulent conveyance holding, and several months after NextWave missed the October payment deadline, the Commission moved the bankruptcy court to lift the stay "so that the . . . automatic cancellation provisions may take effect." *Mot. to Lift Automatic Stay* at 2, *NextWave V*, 235 B.R. 314 (No. 98 B 21529). And in the bankruptcy court, Commission counsel suggested that the automatic stay blocked cancellation of NextWave's licenses, stating for example that although "[t]he regulations provide that upon failure to make the payments the license is

automatically canceled[,] . . . [t]hat hasn't [happened] in this case due to the automatic stay." *See* Hearing Tr. at 30, *In re NextWave Pers. Communications, Inc.*, No. 98 B 21529 (Bankr. S.D.N.Y. Nov. 12, 1998); *NextWave VI*, 244 B.R. at 277 (noting that transcript erroneously attributes this quotation to the Court).

These circumstances suggest that the Commission believed NextWave's licenses had not canceled prior to the notice of re-auction. At the very least, they created doubt about the matter, and as we have held, "when an agency leaves room for genuine and reasonable doubt as to the applicability of its orders or regulations, the statutory period for filing a petition for review is tolled until that doubt is eliminated." *Recreation Vehicle Indus. Ass'n v. EPA*, 653 F.2d 562, 569 (D.C. Cir. 1981). Because the "genuine and reasonable doubt" about the status of NextWave's licenses continued until the Commission issued the notice of re-auction, we conclude that NextWave's petition is timely.

Res Judicata

This brings us to the final and most difficult threshold issue: whether NextWave's Bankruptcy Code arguments are barred by res judicata. "The doctrine of res judicata prevents repetitious litigation involving the same causes of action or the same issues." *I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co.*, 723 F.2d 944, 946 (D.C. Cir. 1983). According to the Commission, because NextWave litigated and lost its Bankruptcy Code arguments in the Second Circuit mandamus proceedings, it may not relitigate them here. Asserting a right to make these arguments here, NextWave argues that the Second Circuit's decision was jurisdictional—a decision about "*where* NextWave's bankruptcy challenges

should be decided, not *how* they should be resolved." Appellants' Opening Br. at 26 (emphasis added). As a result, the company argues, res judicata does not bar it from presenting its Bankruptcy Code arguments in this court.

The doctrine of res judicata "usually is parsed into claim preclusion and issue preclusion." *I.A.M. Nat'l Pension Fund*, 723 F.2d at 946. Because the Commission raises arguments based on both theories, and because the two theories differ in subtle but significant respects, we consider each separately. "Under the claim preclusion aspect of res judicata, a final judgment on the merits in a prior suit involving the same parties or their privies bars subsequent suits based on the same cause of action." *Id.* at 946-47. Claim preclusion prevents parties from relitigating issues they raised or could have raised in a prior action on the same claim. *See Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L.Ed.2d 308 (1980). "[D]ismissals for lack of jurisdiction," however, "are not decisions on the merits and therefore have no [claim preclusive] effect on subsequent attempts to bring suit in a court of competent jurisdiction." *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1248 (D.C. Cir. 1999); *see also* Fed. R. Civ. P. 41(b) ("a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction . . . operates as an adjudication upon the merits").

No one disputes that the Second Circuit thought the bankruptcy court lacked authority to declare the notice of reauction invalid. *In re FCC*, 217 F.3d at 141. The question dividing the parties is why the Second Circuit thought this. According to NextWave, the Second

Circuit reversed the bankruptcy court because under section 402 of the Communications Act, "the FCC's licensing decisions are subject to the exclusive jurisdiction of the federal courts of appeals." *Id.* at 129. In other words, the company claims, the Second Circuit held that any arguments directly or collaterally challenging the Commission's regulatory actions—including arguments based on the Bankruptcy Code—must be brought in a court of appeals. *Cf. In re NextWave*, 200 F.3d at 55. The Commission has a different view of the Second Circuit's decision. It argues that the Second Circuit decided not that the bankruptcy *court* lacked jurisdiction to determine whether the license cancellation violated the Bankruptcy Code, but rather that "the [Bankruptcy *Code*] provisions on which NextWave relies do not reach regulatory actions such as those at issue here." Appellee's Br. at 15. In other words, the Commission claims that the Second Circuit reviewed the bankruptcy court's Bankruptcy Code conclusions on the merits and found that because the Commission's actions were regulatory, the automatic stay, right to cure, and antidiscrimination provisions of the Code did not reach those actions.

We agree with NextWave's interpretation of the Second Circuit's decision. As we read that decision, the court principally held that the Commission's license cancellation was a regulatory act reviewable only by a court of appeals under section 402 of the Communications Act, and thus that the bankruptcy court lacked jurisdiction to apply the Code to these acts. With one exception (which we shall explain later), we do not understand the Second Circuit to have decided as a substantive matter that nothing in the Bankruptcy

Code prevents the Commission from canceling NextWave's licenses.

To begin with, and most obviously, the Second Circuit repeatedly stated that it was making a "jurisdictional" decision based on section 402. Here are just three examples: "We recognized that pursuant to . . . 47 U.S.C. § 402, review of the FCC's regulatory decisions and orders is entrusted solely to the federal courts of appeals and is therefore outside the jurisdiction of the bankruptcy and district courts," *In re FCC*, 217 F.3d at 131 (describing initial opinion); "'[b]ecause jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals, *see* . . . 47 U.S.C. § 402, *the bankruptcy and district courts lacked jurisdiction to decide the question of whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses*,'" *id.* at 137 (quoting initial opinion); "[e]xclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals," *id.* at 139 (citing cases discussing section 402). Reinforcing the jurisdictional nature of its opinion, the Second Circuit also disavowed any intent to rule on the merits of NextWave's challenges to the Commission's acts, stating explicitly that NextWave was "free to pursue its challenge to the FCC's regulatory acts" in an appropriate forum, *id.* at 140, and that the court was making "no comment on the prospects" of such an appeal. *Id.* at 129; *see also id.* at 138 n.8 ("we have no occasion to opine on whether the Public Notice is valid or whether the Licenses automatically canceled at some prior date"); *id.* at 139 ("Even if the bankruptcy court is right on the merits of its arguments against revocation

—we have no occasion to express an opinion—it is without power to act on its determination.").

According to the Commission, these repeated references to the bankruptcy court's lack of jurisdiction mean only that the bankruptcy court lacked jurisdiction to decide whether the Commission had applied the auction requirements of section 309(j) of the Communications Act arbitrarily and capriciously, not that it lacked jurisdiction to review the Commission's actions for compliance with the Bankruptcy Code. Likewise, the Commission suggests, the Second Circuit's references to the prospects of NextWave's appeal refer only to an appeal based on section 309(j). In support of this interpretation, the Commission points to language in the Second Circuit's opinion suggesting that the bankruptcy court lacked jurisdiction to question the Commission's regulatory judgments under section 309(j). *See, e.g., id.* at 131-32 ("'[E]ven if the bankruptcy and district courts were right in concluding that granting the Licenses at a small fraction of NextWave's original successful bid price best effectuated the [Federal Communication Act's] goals, they were *utterly without the power* to order that NextWave be allowed to retain them for that reason or on that basis.'") (quoting initial opinion); *see also id.* at 136-37.

The Second Circuit, however, had good reason to address section 309(j) directly: the bankruptcy court devoted several paragraphs to evaluating the Commission's conduct in light of that section. *See NextWave VI*, 244 B.R. at 271, 281-83. Moreover, it is perfectly consistent to hold that section 402 prohibits the bankruptcy court from reviewing Commission action both under section 309(j) *and* under the Bankruptcy Code.

True, as the Commission points out, other circuits have recognized the jurisdiction of bankruptcy courts to determine whether provisions of the Code such as the automatic stay apply to agency actions. *See, e.g., Word v. Commerce Oil Co. (In re Commerce Oil Co.)*, 847 F.2d 291 (6th Cir. 1988); *Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.)*, 128 F.3d 1294 (9th Cir. 1997). But that is irrelevant to the question we face here: how did the *Second Circuit* view the bankruptcy court's jurisdiction? Regardless of how other circuits—or even we—might interpret section 402, we think the Second Circuit construed the provision to confer "exclusive jurisdiction" on courts of appeals to review even Bankruptcy Code challenges to the Commission's regulatory acts. Many of the court's references to section 402 are not clearly restricted to bankruptcy court power under section 309(j). *See, e.g., In re FCC*, 217 F.3d at 139 ("Exclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals."). And at least once in its opinion, the Second Circuit expressly stated that "[t]he bankruptcy court *lacked jurisdiction* to declare the Public Notice [of reauction] null and void *on [the] ground[s] that the Public Notice violated the automatic stay*, [or] *that the right to cure obviates any default*"—that is, on Bankruptcy Code grounds. *Id.* at 139 (emphasis added).

The Second Circuit's reasoning in granting mandamus further illustrates the jurisdictional nature of its opinion. The court overturned the bankruptcy court's decision on two "independently sufficient" grounds, each discussed in a separate section of the opinion. *See id.* at 141. One ground was that the bankruptcy court lacked "statutory jurisdiction" to nullify the Commission's license cancellation. *Id.* Entitled "Jurisdiction,"

this section of the opinion consists entirely of a discussion of sections 402(a) and (b) of the Communications Act—it never mentions the Bankruptcy Code. *Id.* at 139-41. If, as the Commission maintains, the Second Circuit thought the bankruptcy court lacked authority to invalidate the license cancellation principally because the Code does not reach the Commission's regulatory acts (and if, as the Commission also maintains, the Second Circuit's discussion of "jurisdiction" merely refers to the peripheral issue of the bankruptcy court's jurisdiction to review Commission actions under section 309(j) of the Communications Act) it is difficult to explain why the court failed to discuss the Bankruptcy Code in this section of its opinion, given that the reasons discussed here provide an "independently sufficient" basis for mandamus.

The Second Circuit's other reason for granting mandamus was that the bankruptcy court violated the appellate court's earlier mandate. But as the Second Circuit made clear, its initial opinion too was jurisdictional:

> Our extraordinary mandamus power has two purposes: to achieve compliance with the terms and spirit of our mandates, and to constrain inferior courts to proper exercises of their jurisdiction. In this case, the two uses of mandamus overlap and reinforce one another. This Court's previous opinion reversed a decision of the bankruptcy court on the ground that that court lacked jurisdiction. The bankruptcy court again seeks to control the FCC's allocation of licenses, notwithstanding this Court's express holding that 'the bankruptcy and district courts lack[] jurisdiction to decide the question of whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses.' Thus a writ of mandamus protecting this Court's mandate also confines the inferior court to the lawful exercise of its jurisdiction.

Id. at 137 (quoting *In re NextWave*, 200 F.3d at 54).

To be sure, in the "mandate" section of its opinion, the Second Circuit appeared to decide on the merits that at least some parts of the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362, do not apply to the facts of this case. *See In re FCC*, 217 F.3d at 138 ("Undoubtedly, the [Commission] is a governmental unit that is seeking 'to enforce' its 'regulatory power' [under subsection 362(b)(4)]."); *id* at 138 n.8 ("[W]e hold that the FCC's regulatory decisions fall within [subsection] 362(b)(4)."). But leaving aside for the moment the effect of this discussion under the doctrine of issue preclusion, this portion of the Second Circuit's opinion does not change our view that the court's decision was primarily jurisdictional, for the court expressly couched its discussion of the automatic stay in jurisdictional terms: the court prefaced its discussion by noting that "[t]he bankruptcy court *founds its jurisdiction* [to interfere with the FCC's enforcement of its payment schedule] chiefly on the automatic stay provision of [section 362]. . . ." *Id.* at 138 (emphasis added). We need not decide whether this jurisdictional interpretation of section 362 is correct—the Supreme Court has declined to express an opinion on the issue, *see Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 41 n.11, 112 S. Ct. 459, 116 L.Ed.2d 358 (1991)—because the Commission's res judicata argument requires only that we determine what the

Second Circuit meant, and here we think it clear that the court treated section 362 as though it provided a potential basis for bankruptcy court jurisdiction.

In addition to this direct evidence of the jurisdictional nature of the Second Circuit opinion, the Commission's alternate view of the opinion—that the court decided as a substantive matter that nothing in the Bankruptcy Code prevents the Commission from canceling NextWave's licenses—is implausible. Not only does this interpretation fail to account fully for the opinion's jurisdictional language, *see supra* at 26a-27a, but the Second Circuit never actually states that the Bankruptcy Code as such does not reach the Commission's regulatory acts: the entire opinion concerns the power and jurisdiction of the bankruptcy court. Perhaps most telling, the Second Circuit does not discuss any provision of the Bankruptcy Code besides section 362, despite the fact that the bankruptcy court discussed section 525 and made a ruling based on sections 1123 and 1124. As NextWave argues, "[t]he exclusively jurisdictional character of the Second Circuit's ruling provides a *complete* explanation for its . . . silence respecting NextWave's principal bankruptcy arguments." Appellants' Reply Br. at 4.

Faced with the Second Circuit's silence about sections 525 and 1123, the Commission suggests that even though the court failed to mention these provisions, it necessarily decided that they do not bar the license cancellation because "mandamus relief is warranted only where the petitioner has demonstrated that its right to such relief is clear and indisputable," and "the Second Circuit would not have granted our request for extraordinary relief if it had thought that the bankruptcy court's decision was sustainable on the basis of [section] 525" or 1123. Appellee's Br. at 21 n.13 (internal quotation omitted); *id.* at 24 n.15. The assumption that the Second Circuit "necessarily" resolved these arguments, however, is valid only if the Commission's view of the case is correct—that is, if the Second Circuit meant to decide as a substantive matter that the Bankruptcy Code did not reach the Commission's actions. If instead the Second Circuit principally decided, as much of the opinion's language suggests, *see supra* at 24a-27a, that the bankruptcy court lacked jurisdiction to hear these arguments, that conclusion would also have provided a basis for mandamus, without requiring the court to consider or decide anything about sections 525 and 1123 at all.

The Commission offers a second, equally unpersuasive explanation for the Second Circuit's silence regarding sections 525 and 1123. The bankruptcy court's analysis of those provisions, the Commission says, "hinges on its characterization of the FCC as an ordinary creditor," Appellee's Br. at 24, and by rejecting decisively this characterization, the Second Circuit in effect decided that these parts of the Code do not apply. Apart from the fact that it seems odd that the Second Circuit would have decided that sections 525 and 1123 do not apply without ever mentioning them, this argument fails because, like the previous argument, it assumes the correctness of the Commission's reading of the Second Circuit's opinion. But the alternate reading of the opinion—that the bankruptcy court lacked jurisdiction to hear challenges to the Commission's regulatory actions based on the Bankruptcy Code or otherwise—also relies upon the notion that the Commission is not an ordinary creditor but a regulator

in this situation. The fact that the Second Circuit decided that the Commission was not acting as an ordinary creditor when it canceled the licenses thus does not indicate that the court implicitly decided that sections 525 and 1123 are inapplicable to this case.

Having thus concluded that the Second Circuit's opinion was jurisdictional and that claim preclusion does not bar NextWave from re-litigating its Bankruptcy Code arguments in this court, we turn to the Commission's second major res judicata argument: that each of NextWave's Bankruptcy Code arguments is barred by issue preclusion. "Under the issue preclusion aspect of res judicata, a final judgment on the merits in a prior suit precludes subsequent relitigation of issues actually litigated and determined in the prior suit, regardless of whether the subsequent suit is based on the same cause of action." *I.A.M. Nat'l Pension Fund*, 723 F.2d at 947. Issue preclusion is most often invoked where "a subsequent action is brought on a different claim," *id.* at 947 n.3, and as a result claim preclusion does not apply. Issue preclusion, however, may also apply to subsequent actions brought on the same claim: if a judgment "does not preclude relitigation of all or part of the claim on which the action was brought"—if, for example, as here, the judgment was jurisdictional —it may still preclude relitigation of any *issues* "actually litigated and determined" in the first action. *Id.* For issue preclusion to apply, however, "the issue must have been actually and necessarily determined by a court of competent jurisdiction in the first trial." *Connors v. Tanoma Mining Co.*, 953 F.2d 682, 684 (D.C. Cir. 1992) (internal quotation and emphasis omitted). If the "basis" of a prior decision is "unclear, and it is thus uncertain whether the issue was actually and necessarily decided in [the prior] litigation, then relitigation of the issue is not precluded." *Id.*

It may appear that the only issue potentially barred by issue preclusion from a case dismissed for lack of jurisdiction is the jurisdictional determination itself. *Cf. Kasap*, 166 F.3d at 1248. In this case, it may thus seem that the Second Circuit cannot have ruled on the merits of any of NextWave's Bankruptcy Code arguments, because the court only decided that the bankruptcy court lacked jurisdiction to hear them. And indeed, under our jurisdictional interpretation of the Second Circuit's decision, we do not think the court "actually and necessarily" decided whether sections 525 and 1123 bar the license cancellation. We thus conclude that issue preclusion does not bar relitigation of these issues.

Far less clear, however, is whether issue preclusion bars NextWave's section 362 argument. As we have seen, the Second Circuit explicitly discussed section 362's automatic stay, finding that the bankruptcy court could not rely on the provision as an independent basis for jurisdiction because the license cancellation was a regulatory act exempt under subsection 362(b)(4). *See supra* at 28a-30a. It is true, as we have said, that this was a jurisdictional discussion, but this does not preclude it from having issue preclusive effect: if a court makes a substantive determination in order to arrive at a jurisdictional holding, the substantive determination can have issue preclusive effect so long as it was "actually litigated and determined in the prior

action." *See I.A.M. Nat'l Pension Fund*, 723 F.2d at 947 n.3. The *Restatement* gives the following example:

> A brings an action against B for personal injuries arising out of an automobile accident. Jurisdiction is asserted over B, a nonresident, on the basis that the automobile involved in the accident was being operated in the state by or on his behalf. After trial of this issue, the action is dismissed for lack of jurisdiction. In a subsequent action by A against B for the same injuries, brought in the state of B's residence, the prior determination that the automobile was not being operated by or on behalf of B is conclusive.

RESTATEMENT (SECOND) OF JUDGMENTS § 27, illustration 3 (1980).

Here, the Second Circuit appears to have decided that section 362 does not confer jurisdiction on the bankruptcy court *because* subsection 362(b)(4)'s "regulatory power" exception applies as a substantive matter. We thus agree with the Commission that issue preclusion bars NextWave from relitigating the question of whether the license cancellation falls within subsection 362(b)(4). The Second Circuit spoke clearly and unequivocally about this issue, stating that "[u]ndoubtedly, the FCC is a governmental unit that is seeking 'to enforce' its 'regulatory power,'" *In re FCC*, 217 F.3d at 138, and that "we hold that the FCC's regulatory decisions fall within [subsection] 362(b)(4)." *Id.* at n.8. And under the Second Circuit's jurisdictional reading of section 362, this decision was necessary to the case: if subsection 362(b)(4) did not apply, section

362 could have provided a basis for the bankruptcy court to assert jurisdiction over the license cancellation. In considering NextWave's Bankruptcy Code arguments, *see* Section III *infra*, we will thus assume that the license cancellation falls within the regulatory power exception to the automatic stay.

We are less sure, however, that the Second Circuit "actually and necessarily" decided as part of its jurisdictional decision that *all* provisions of section 362 do not apply to the license cancellation. In particular, as the Second Circuit implicitly acknowledged, subsection 362(b)(4)'s "regulatory power" exception does not apply to subsections 362(a)(4) and (5), which stay actions to enforce liens. *See In re FCC*, 217 F.3d at 138. Although the bankruptcy court thought the cancellation of NextWave's licenses "unarguably violate[d]" these subsections, *NextWave VI*, 244 B.R. at 267, and explicitly quoted the language in the security agreements creating a "first lien on and continuing security interest in" the licenses, *id.* at 267 n.7, the Second Circuit, in a footnote, simply observed: "Subsections (4) and (5) are concerned with liens. The bankruptcy court does not explain why they are implicated here." *In re FCC*, 217 F.3d at 138 n.7. Thus, unlike in its subsection 362(b)(4) discussion, the Second Circuit never said it was "hold[ing]" that subsections 362(a)(4) and (5) do not apply to the cancellation of NextWave's licenses. *Cf. id.* at 138 n.8. Instead, the court merely observed that the *bankruptcy court* did not explain why they are implicated. It is thus unclear whether the Second Circuit decided that subsections 362(a)(4) and (5) do not block cancellation of NextWave's licenses, or whether it simply concluded that it had no need to reach the issue because the bankruptcy court failed adequately to

address it. Since under our decision in *Connors*, if it is "uncertain whether [an] issue was actually and necessarily decided in [prior] litigation, then relitigation of the issue is not precluded," 953 F.2d at 684, we conclude that NextWave is not barred from arguing that subsections 362(a)(4) and (5) prohibit cancellation of its licenses.

Having resolved these threshold issues, we turn to the merits of NextWave's appeal.

III

NextWave argues that the Commission's cancellation of its licenses violated sections 525, 1123, and 362 of the Bankruptcy Code. Under the Administrative Procedure Act, we must "hold unlawful and set aside agency action . . . found to be . . . not in accordance with law [or] . . . in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2). This provision requires us to invalidate agency action not only if it conflicts with an agency's own statute, but also if it conflicts with another federal law. *See, e.g., Scheduled Airlines Traffic Offices, Inc. v. Dept. of Def.*, 87 F.3d 1356, 1361 (D.C. Cir. 1996) (applying 5 U.S.C. § 706(2)(A) and declaring Department of Defense policy invalid under Miscellaneous Receipts statute); *see also Cousins v. Sec'y of the U.S. Dept. of Transp.*, 880 F.2d 603, 608 (1st Cir. 1989) (stating that the quoted passages from section 706 are "general in their meaning" and "do not restrict the courts to consideration of the agency's own enabling statute").

We begin with section 525:

> [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license . . . or other similar grant to, . . . discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is . . . a bankrupt or a debtor under the Bankruptcy Act . . . solely because such bankrupt or debtor . . . has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 525(a). No one disputes that the Commission is a "governmental unit" that has "revoke[d]" a license for purposes of section 525, nor that NextWave is a "bankrupt or a debtor under the Bankruptcy Act." Pointing to the fact that the Commission has filed proofs of claim in bankruptcy court based on its security interests in PCS licenses, *see, e.g.*, Proof of Claim, *In re NextWave Pers. Communications, Inc.*, No. 98 B 21529 (Bankr. S.D.N.Y. Dec. 16, 1998) (filed on behalf of creditor The United States of America), NextWave argues that the installment payment obligations were dischargeable debts under the Bankruptcy Code. *See* 11 U.S.C. § 1141(d) (stating that dischargeable debts under Chapter 11 generally include "any debts that arose before the date of . . . confirmation" of the debtor's reorganization plan). And because failure to make installment payments was the "sole triggering mechanism" for automatic cancellation, NextWave continues, its licenses canceled "solely because" it failed to pay dischargeable debts. Appellants' Reply Br. at 8.

The Commission never denies that if NextWave had made its payments, the company could have retained its licenses. Nor does the Commission dispute that NextWave's license fee obligations were at least in part genuine, enforceable debts—indeed, the Commission's own regulations provide for their collection if left unpaid. *See* 47 C.F.R. § 1.2110(g)(4)(iv) ("A licensee in the PCS C or F [B]locks shall be in default, its license shall automatically cancel, *and it will be subject to debt collection procedures*, if the payment due on the payment resumption date . . . is more than ninety (90) days delinquent.") (emphasis added). Instead, the Commission offers a series of unpersuasive arguments intended to demonstrate why, notwithstanding section 525's apparent applicability, the provision does not bar cancellation of NextWave's licenses.

First, the Commission urges us to read section 525 in light of section 362. The latter section, the Commission suggests, "serves the important purpose of providing a debtor with some breathing room in the situations to which it applies. Accordingly, [section] 362 should be broader than [section] 525, providing for breathing room even in some situations where cancellation ultimately would be permitted." Appellee's Br. at 21-22. Thus, the Commission argues, because (on its reading) the automatic stay does not apply to this case, section 525 should not apply either. Fleshing out this argument, Intervenors suggest that "[i]t would make little sense for Congress to exempt governmental 'regulatory' actions from the stay [under subsection 362(b)(4)] but then flatly forbid them in [section] 525. Basic structural coherence requires the conclusion that [section] 525 does not prevent a license cancellation already correctly found exempt from the stay as regulatory." Intervenors' Br. at 18.

This is an interesting argument, but it fails for several reasons. To begin with, it is inconsistent with section 525's plain language. Section 525 clearly and explicitly prohibits governmental units, for *whatever* reason, from canceling licenses for failure to pay a dischargeable debt: "a governmental unit may not . . . revoke . . . a license . . . to . . . a bankrupt . . . solely because such bankrupt . . . has not paid a debt that is dischargeable . . . under this title." 11 U.S.C. § 525(a). Nothing in section 525 or 362 states that section 525 is subject to subsection 362(b)(4)'s regulatory power exception, or that the exception should be read to limit section 525's clear reach. Thus, while interpretation of the Bankruptcy Code is a "holistic endeavor," and "[a] provision that may seem ambiguous in isolation" can often be "clarified by the remainder of the statutory scheme," *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L.Ed.2d 740 (1988), here we see no such ambiguity. Various bankruptcy and district courts, accordingly, have held that section 525 can apply even if the automatic stay does not. *See, e.g., William Tell II, Inc. v. Illinois Liquor Control Comm'n (In re William Tell II, Inc.)*, 38 B.R. 327, 330 (N.D. Ill. 1983) ("even if a state proceeding is not automatically stayed, a bankruptcy court has authority to enjoin certain conduct under 11 U.S.C. § 525"); *In re The Bible Speaks*, 69 B.R. 368, 373 n.5 (Bankr. D. Mass. 1987) ("[Section] 525(a) is directed at governmental units and may apply even where the automatic stay has no effect.").

Moreover, contrary to Intervenors' argument, this interpretation of section 525 does not render the Code "structural[ly] [in]coheren[t]." Though this reading does mean that an action exempted under subsection 362(b)(4) might nonetheless be barred by section 525, it does not render subsection 362(b)(4) meaningless, because that subsection covers a different and wider variety of actions than section 525. For example, subsection 362(b)(4) exempts from the automatic stay (among other things) "*any* act" by a governmental unit to "obtain possession of property of the estate . . . or to exercise control over property of the estate," so long as the act is taken to enforce the unit's "regulatory power." 11 U.S.C. § 362(a)(3), (b)(4) (emphasis added). Section 525, in contrast, prohibits governmental units only from taking certain *specific* actions with respect to an extremely limited subset of a debtor's property —licenses and similar grants—or with respect to employment opportunities.

Even if the Commission were correct that section 525 should be read to permit all actions exempted from the automatic stay by subsection 362(b)(4), that argument would be inapplicable to this case because subsection 362(b)(4) does not apply to the stay of acts to "create, perfect, or enforce" liens against property of the estate or of the debtor imposed by subsections 362(a)(4) and (5). Here, NextWave executed security agreements giving the Commission a "first lien" on the company's interest in the licenses, and under subsections 362(a)(4) and (5), "a creditor holding a lien on property of the estate may not enforce the lien by seizure, foreclosure, or otherwise." 3 COLLIER ON BANKRUPTCY ¶ 362.03[6] (15th ed. rev. 2000). Stayed actions include "self-help remedies against collateral" such as "repossession." *Id.*

¶ 362.03[6][b]. Before the bankruptcy court, Commission counsel acknowledged that canceling the licenses and seeking to collect on the debt was "tantamount . . . to foreclosing on collateral." Hearing Tr. at 14, *In re NextWave Pers. Communications, Inc.*, No. 98 B 21529 (Bankr. S.D.N.Y. May 26, 1999). Thus, contrary to the Commission's argument, and notwithstanding the applicability of the regulatory power exception, section 362's automatic stay *does* apply here. This is thus not a case in which section 525, if applicable, would bar an action exempt from the automatic stay.

The Commission next argues that section 525 is inapplicable because NextWave's license fee obligation was not a "dischargeable" debt. In support of this proposition, the Commission offers two arguments. First, it claims that the New York bankruptcy court could not have discharged NextWave's debt because the Second Circuit, whose decisions are binding on that court, held in its initial opinion that so long as NextWave retained its licenses, its payment obligation was subject to neither modification nor discharge in bankruptcy. As a result, the Commission concludes, the payment obligation was not a debt "dischargeable" in bankruptcy while the license was held.

We disagree. To begin with, it is unclear that the Second Circuit in fact thought the bankruptcy court lacked power to alter or discharge the payment obligation while NextWave held the licenses. Though parts of its initial opinion do suggest this, *see In re NextWave*, 200 F.3d at 56, other parts suggest that the court simply thought the bankruptcy court had no authority to require the Commission to allow NextWave to *keep* its licenses after modification of its payment obligation.

See, e.g., id. at 54 ("It is beyond the jurisdiction of a court in a collateral proceeding to mandate that a licensee be allowed to keep its license despite its failure to meet the conditions to which the license is subject."). If the latter reading is correct, then insofar as NextWave's payment obligation was a debt (as opposed to a license condition), it *was* dischargeable by the bankruptcy court. Even if the Commission's reading of the Second Circuit's opinion is correct, the Commission's argument assumes that the phrase "debt that is dischargeable . . . under this title" in section 525(a) refers to the bankruptcy *court's* power to modify or discharge a payment obligation. The provision's plain language, however, refers to a payment obligation that can be modified or discharged under the Bankruptcy *Code*; and as we read the Second Circuit's opinion, the court merely decided that insofar as timely payment was a condition for license retention, the bankruptcy court had no authority to modify it. It never decided that a court of competent jurisdiction (such as this one) could not modify or discharge it under section 525.

The Commission also argues that because "[a] licensee's full and timely payment of its winning bid installments is an essential condition of its license grant[,] [p]ayment . . . is a regulatory requirement, not a dischargeable debt." Appellee's Br. at 22. At oral argument, Commission counsel conceded that the payment obligation *also* has the character of a dischargeable debt. As we indicated earlier, the Commission could seek to collect its license fee, and in so doing it would be subject (as the Second Circuit held) to the constraints imposed on creditors by the Bankruptcy Code. *See In re NextWave*, 200 F.3d at 56. But here, the Commission contends, it seeks only to revoke NextWave's licenses, not to collect on the debt, and insofar as timely payment is a condition of license retention, it is a regulatory requirement, not a dischargeable debt, and section 525 is inapplicable.

As Commission counsel also acknowledged, this claim amounts to a request for a regulatory purpose exception to section 525: the Commission in effect argues that because (for legitimate regulatory motives) it made timely payment a regulatory requirement, it should be permitted to cancel licenses for failure to meet that requirement despite section 525's plain language ("a governmental unit may not . . . revoke . . . a license . . . to . . . a bankrupt . . . solely because such bankrupt . . . has not paid a debt that is dischargeable . . . under this title"). But basic principles of statutory interpretation preclude such a result. To begin with, section 525 contains several exceptions, but none for agencies fulfilling regulatory purposes. *See* 11 U.S.C. § 525(a) ("Except as provided in the Perishable Agricultural Commodities Act . . . the Packers and Stockyards Act . . . and section 1 of . . . 'An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes' . . . a governmental unit may not deny, revoke, suspend . . . a license. . . ."). This in itself suggests that Congress did not intend to provide a regulatory purpose exception to section 525. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188, 98 S. Ct. 2279, 57 L.Ed.2d 117 (1978) (relying on fact that Endangered Species Act "creates a number of limited 'hardship exemptions'" but none for federal agencies to conclude "under the maxim *expressio unius est exclusio alterius* . . . that these were the only 'hardship cases' Congress intended to exempt"). Moreover, other parts

of the Bankruptcy Code contain explicit regulatory purpose exceptions. Section 362, as we have seen, exempts from certain provisions of the automatic stay any "governmental unit" exercising its "police or regulatory power." 11 U.S.C. § 362(b)(4). Section 362 also contains a series of narrower exceptions for certain named agencies that have entered lending relationships, allowing them to engage in particular acts of foreclosure and other actions. *See, e.g.*, 11 U.S.C. § 362(b)(8) (exception permitting HUD Secretary to foreclose on certain mortgages insured under the National Housing Act). To us, these express exceptions demonstrate that section 525 contains neither an implied regulatory power exception for governmental units in general nor an implied agency-specific exception allowing the Commission to enforce an automatic cancellation policy pursuant to an installment payment scheme under section 309(j) of the Communications Act. *See Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L.Ed.2d 17 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation omitted).

Next, Intervenors argue that even if the license fee obligation itself is a dischargeable debt, the Commission did not cancel NextWave's licenses "solely because" of failure to pay that debt. "The 'solely because' language," they argue, "limits the bar on license revocation to circumstances where a government [agency] is simply advancing creditor interests in receiving the money due." Intervenors' Br. at 16-17. Since here, license cancellation was intended not to induce payment but

instead to "protect[] the integrity of [the] auction[] and select[] the applicant most likely to use the Licenses efficiently for the benefit of the public," section 525 is not implicated, because "it is not the 'debt' character of the defaulted obligation that is the 'sole' basis for the cancellation." *Id.* (internal quotation omitted).

We are unconvinced. Intervenors argue that "solely because" should be read to mean "solely because of creditor interests in receiving the money due." But the statute says nothing about an agency's motives in canceling a license for failure to pay a dischargeable debt—it simply says governmental units may not cancel licenses "solely because" a debtor "has not *paid*" such a debt. *See* 11 U.S.C. § 525(a) (emphasis added). It may be true, as the Second Circuit decided, that the Commission had a regulatory motive for examining NextWave's timely payment record and canceling its licenses on that basis, but as we pointed out earlier, neither the Commission nor Intervenors dispute that NextWave could have retained its licenses if it had made timely installment payments. NextWave's failure to make its payments was thus the "sole" trigger of the license cancellation, in the sense that the Commission looked to no other factor in determining whether NextWave should retain its licenses; and we think this is exactly the kind of conduct barred by section 525's plain text. Adopting Intervenors' intent-based reading of section 525 would allow governmental units to escape section 525's limitations simply by invoking a regulatory motive for their concern with timely payment, and as we have already explained, section 525 contains no implicit regulatory purpose exception.

To support their view that the phrase "solely because" permits license cancellation based on failure to pay a dischargeable debt so long as the cancellation is motivated by a non-pecuniary regulatory purpose, Intervenors point to legislative history stating that section 525 "does not prohibit consideration of . . . factors[] such as future financial responsibility or ability . . . if applied nondiscriminatorily," H.R. REP. NO. 95-595, at 367 (1977), U.S. Code Cong. & Admin. News 1978, 5787, 6322, 6323, and that "in those cases where the causes of the bankruptcy are intimately connected with the license grant . . . an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy." *Id.* at 165, U.S. Code Cong. & Admin. News 1978, at 6126. But these passages do not lead us to conclude that section 525 is inapplicable here. To begin with, we may not "resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48, 114 S. Ct. 655, 126 L.Ed.2d 615 (1994). Moreover, while the quoted passages do suggest that agencies may make regulatory decisions (including perhaps canceling the licenses of bankrupt debtors) based on factors such as future financial responsibility or ability, they do not state that an agency may use timely payment of a dischargeable debt as the sole indicator of such responsibility, as the Commission has done here. *Cf.* H.R. REP. NO. 95-595, at 165, U.S. Code Cong. & Admin. News 1978, at 6126 ("The purpose of [section 525] is to prevent an automatic reaction against an individual for availing himself of the protection of the bankruptcy laws.").

Duffey v. Dollison, 734 F.2d 265 (6th Cir. 1984), which Intervenors invoke, reinforces rather than undermines this interpretation of section 525. In *Duffey*, the court upheld as applied to a bankrupt debtor a state law suspending the driver's license of anyone who failed to make timely payment of a state tort judgment until that person provided proof of future financial responsibility. The statute at issue there specifically required extrinsic "evidence of financial responsibility," such as a certificate of insurance or a bond, in order to reinstate a license, and was specifically re-written *not* to require payment of discharged debts as a precondition for reinstatement: "the registrar shall vacate the order of suspension *upon proof that such judgment is stayed*, or satisfied in full . . . *and upon such person's filing . . . evidence of financial responsibility. . . .*" *Id.* at 269 (quoting OHIO REV. CODE § 4509.45 (Baldwin 1975)). The Commission's automatic cancellation policy, in contrast, refers to no analogous extrinsic evidence of fitness to hold a license, and allows license cancellation to rest solely on failure to pay a dischargeable debt.

Finally, noting that section 525 is entitled "Protection against discriminatory treatment," and that the House Report on the bankruptcy bill provides that section 525 "extends only to discrimination or other action based solely . . . on the basis of nonpayment of a debt discharged in the bankruptcy case," H.R. REP. NO. 95-595, at 366-67, U.S. Code Cong. & Admin. News 1978, at 6322, the Commission suggests that the provision is inapplicable here because "[a]ll licensees lost their licenses if they failed to meet the payment deadline." Appellee's Br. at 23.

The text of section 525, however, includes "discriminat[ion]" only as an item in a series of prohibited actions: "a governmental unit may not deny, revoke, suspend, or refuse to renew a license . . . to, [*or*] condition such a grant to, [*or*] discriminate with respect to such a grant against, [*or*] deny employment to, [*or*] terminate the employment of, *or* discriminate with respect to employment against[] a person that is . . . a debtor under this title. . . ." 11 U.S.C. § 525(a) (emphasis added). Another prohibited action in the series is (as we have just seen) to "revoke" the license of a bankrupt "solely because such bankrupt" has "not paid a debt dischargeable" under the Bankruptcy Code —precisely what happened in this case. And the House Report itself explicitly states that section 525 "extends only to discrimination *or other action* based solely . . . on the basis of nonpayment of a debt discharged in the bankruptcy case. . . ." H.R. REP. NO. 95-595, at 366-67, U.S. Code Cong. & Admin. News 1978, at 6322 (emphasis added); *see also Walker v. Wilde (In re Walker)*, 927 F.2d 1138, 1142-43 (10th Cir. 1991) (invalidating under section 525 a license cancellation policy that applied to bankrupts and non-bankrupts alike).

We have no doubt that in developing its installment payment plan, the Commission made a good faith effort to implement Congress's command to encourage small businesses with limited access to capital to participate in PCS auctions. We are also mindful that, as the Commission suggests, allowing NextWave to retain its licenses may be "grossly unfair" to losing bidders and licensees who "complied with the administrative process and forfeited licenses or made timely payments despite their financial difficulties." Appellee's Br. at 9. Any unfairness, however, was inherent in the Com-

mission's decision to employ a licensing scheme that left its regulatory actions open to attack under Chapter 11 of the Bankruptcy Code, the very purpose of which is "to permit successful rehabilitation of debtors." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527, 104 S. Ct. 1188, 79 L.Ed.2d 482 (1984); *see also* H.R. REP. NO. 95-595, at 220, U.S. Code Cong. & Admin. News 1978, at 6179 ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders."). The Code expressly contemplates that bankrupts will sometimes avoid the consequences of late or non-payment they might have faced had they not filed for bankruptcy. *See, e.g.*, 11 U.S.C. § 1123(a)(5)(G) (stating that a reorganization plan may, among other options, provide for "curing or waiving of any default"); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204, 103 S. Ct. 2309, 76 L.Ed.2d 515 (1983) ("The creditor with a secured interest in property included in the estate must look to [the provisions of the Bankruptcy Code] for protection, rather than to the nonbankruptcy remedy of possession."). And the Code's restrictions have been applied even to the official actions of Government agencies. *See, e.g., Whiting Pools*, 462 U.S. at 209, 103 S. Ct. 2309 (enforcing the Bankruptcy Code against the IRS to prevent seizure of property under a tax lien and concluding that "[n]othing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector"). Here, as we have explained, we think section 525 prevents the Commission, whatever its motive, from canceling the licenses of winning bidders who fail to make timely installment payments while in Chapter 11.

We do not think this conclusion frustrates the purposes of the Communications Act, because nothing in the Act required the Commission to choose the licensing scheme at issue here. Although section 309(j) suggests the possibility of using guaranteed installment payments of some kind, the statute also suggests alternative methods of facilitating small business participation. *See* 47 U.S.C. § 309(j)(4)(A). Indeed, in 1998, the Commission decided that "until further notice, installment payments should not be offered in auctions as a means of financing small businesses and other designated entities seeking to secure spectrum licenses." *See Competitive Bidding Proceeding*, 63 Fed. Reg. 2315, 2318-19 (Jan. 15, 1998). Moreover, irrespective of the Commission's decision to use installment payments as part of its licensing scheme, nothing in the Act required it to enter a creditor relationship with winning bidders, take liens on licenses, or—most important for our decision here—make timely payment a license condition. For example, the Commission could have required winning bidders to obtain third party guarantees for their license fee obligations, or required full upfront payment from C Block licensees and helped them obtain loans from third parties. The Commission could also have made license grants conditional on periodic checks of financial health, a more extensive credit check, or some other evidence that winning bidders were capable of using their licenses in the public interest. Having chosen instead a scheme that put it in a creditor-debtor (and lienholder) relationship with its licensees and conditioned licenses on timely payment of their debts, and having as a consequence run afoul of section 525 of the Bankruptcy Code, the Commission may not escape that provision's clear

command simply because it acted for a regulatory purpose.

IV

In view of our conclusion that the Commission violated section 525 of the Bankruptcy Code in canceling NextWave's licenses, we need not consider NextWave's remaining Bankruptcy Code arguments, nor its arguments that the cancellation violated principles of due process and fair notice. We therefore reverse and remand to the Commission for proceedings not inconsistent with this opinion.

So ordered.

APPENDIX B

Before the
Federal Communications Commission
Washington, D.C. 20554

File Nos. 00341CWL96, et. al.

IN THE MATTER OF PUBLIC NOTICE DA 00-49 AUCTION OF C AND F BLOCK BROADBAND PCS LICENSES
NEXTWAVE PERSONAL COMMUNICATIONS, INC. AND NEXTWAVE POWER PARTNERS INC. PETITION FOR RECONSIDERATION

IN RE SETTLEMENT REQUEST PURSUANT TO DA 99-745 FOR VARIOUS BROADBAND PCS C BLOCK LICENSES

[Adopted: August 31, 2000]
[Released: September 6, 2000]

ORDER ON RECONSIDERATION

By the Commission: Commissioner Furchtgott-Roth issuing a statement.

I. Introduction

1. We have before us a Petition for Reconsideration ("Petition") filed by NextWave Personal Communications Inc. and NextWave Power Partners Inc. (collectively, "NextWave").[1] NextWave requests that the

[1] *See* Petition for Reconsideration filed by NextWave Personal Communications and NextWave Power Partners Inc. (February 11, 2000) ("NextWave Petition"). On August 11, 21 and 24, 2000, NextWave filed letter supplements to its Petition which we also address in this order.

Commission review the Wireless Telecommunications Bureau's ("Wireless Bureau") public notice, which announced an auction of the C and F block Personal Communications Service ("PCS") spectrum licenses previously licensed to NextWave.[2] For the reasons set forth below, we deny NextWave's Petition. In addition, we dismiss Antigone Communications, Limited Partnership and PCS Devco, Inc.'s ("Antigone/Devco") Application for Review and Settlement Request as moot.

II. Background

2. Section 309(j)(4)(D) requires the Commission, when promulgating auctions regulations, to ensure that small businesses and other designated entities are given the opportunity to participate in the provision of spectrum-based services.[3] In accordance with its mandate, the Commission created provisions in the auctions program to promote participation by small businesses in broadband PCS, such as limiting eligibility for the C and F block auctions to those with total assets and revenues below a certain threshold, and offering bidding credits and installment payment plans.[4]

[2] *See* "Auction of C and F Block Broadband PCS Licenses," *Public Notice*, DA 00-49, 15 FCC Rcd 693 (2000) (*January 12th Public Notice*). On June 7, 2000, the Wireless Bureau released a public notice postponing the C and F block auction until November 29, 2000. *See* "Auction of Licenses for C and F Block Broadband PCS Spectrum Postponed Until November 29, 2000," *Public Notice*, DA 00-1246 (rel. June 7, 2000).

[3] See 47 U.S.C. § 309(j)(4)(D).

[4] The installment payment plan for C block permitted licensees that qualified as small businesses to pay 90% of the bid price over a

3. NextWave was the high bidder on 95 licenses in the broadband PCS C, D, E, and F block auctions that concluded in 1996 and 1997.[5] A petition to deny was filed against NextWave's C block license application and, ultimately, the Wireless Bureau found NextWave in violation of the Commission's foreign ownership restrictions. NextWave's C block licenses were conditionally granted on January 3, 1997, however, subject to certain restructuring obligations to bring the company into compliance with the Commission's foreign ownership rules.[6] Each of NextWave's C and F block licenses

---

period of ten years, with interest paid for the first six years and interest and principal for the remaining four. *See* 47 C.F.R. § 24.711(b)(3) (1996). The installment payment plan for F block permitted licensees that qualified as small businesses to pay 80% of the bid price over a period of ten years, with interest paid for the first eight years and interest and principal for the remaining two. *See* 47 C.F.R. § 24.716(b)(3) (1997). All but two bidders in the 1996 C block auction qualified as small businesses.

[5] *See* "Entrepreneur's C Block Auction Closes: FCC Announces Winning Bidders in the Auction of 493 Licenses to Provide Broadband PCS in Basic Trading Areas," *Public Notice*, DA 96-716 (rel. May 8, 1996); "Entrepreneur's C Block Reauction Closes—FCC announces Winning Bidders in the Reauction of 18 Licenses to Provide Broadband PCS in Basic Trading Areas," *Public Notice*, DA 96-1153, 11 FCC Rcd 8183 (1996); "D, E, and F Block Auction Closes—Winning Bidders in the Auction of 1,479 Licenses To Provide Broadband PCS in Basic Trading Areas," *Public Notice*, DA 97-81 (rel. Jan. 15, 1997). While the C and F block licenses that NextWave won were to be paid for by installment payments, NextWave paid for its D and E block licenses in full in accordance with the Commission's rules.

[6] *See* "Wireless Telecommunications Bureau Announces Conditional Grant Of Broadband Personal Communications Services Entrepreneurs' C Block Licenses To Nextwave Personal Communications, Inc.—Final Down Payment due by January 10, 1997," *Public Notice*, DA 97-12 (rel. Jan. 3, 1997); In re Applications of

was explicitly conditioned on full and timely payment of all installments under the Commission's installment payment plan, and each license stated that "[f]ailure to comply with this condition will result in the automatic cancellation of this authorization."[7] Antigone/Devco filed an Application for Review of the Commission's decision to conditionally grant NextWave's licenses on March 17, 1997. Antigone/Devco subsequently filed a settlement request setting forth the terms of a proposed settlement under which the Application for Review would be withdrawn.[8]

4. After it received its C block licenses, NextWave and other PCS block licensees petitioned the Commission for relief in order to modify their installment payment obligations.[9] In response, the Commission suspended C and F block installment payments temporarily[10] and initiated a rulemaking proceeding in order to consider whether to provide relief, and if so,

---

NextWave Personal Communications Inc. for Various C Block Broadband PCS Licenses, *Memorandum Opinion and Order*, 12 FCC Rcd 2030, 2034, ¶ 9 (1997).

[7] License at 2.

[8] *See* Settlement Request Pursuant to DA 99-745, filed by Antigone/Devco (filed April 29, 1999); Request for Approval of Withdrawal of Pleading and Motion To Dismiss With Prejudice, filed by Antigone/Devco (filed June 1, 1998).

[9] *See* "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," *Public Notice*, DA 97-679, 12 FCC Rcd 24230 (1997).

[10] Installment payments were suspended for C block licensees on March 31, 1997, and for F block licensees on April 28, 1997. *See* Installment Payments for PCS Licenses, *Order*, 12 FCC Rcd 17325 (1997); "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," *Public Notice*, DA 97-883, 13 FCC Rcd 1286 (1997).

the scope of that relief to C and/or F block licensees.[11] Ultimately, the Commission adopted several restructuring options to assist C block licensees in meeting their debt obligations, including resumption of payments, disaggregation, amnesty and prepayment.[12] All of the elections entailed licensees paying the full bid price, on a *pro rata* basis, for any and all spectrum retained by the licensee. Licensees were required to elect from among these options by June 8, 1998, the Election Date, and resume payments by July 31, 1998.[13] In the event licensees could not make payment by July 31, 1998, the *Restructuring Orders* gave licensees a single 90-day grace period, *i.e.*, until October 29, 1998,

---

[11] *Supra* at note 9.

[12] In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order*, FCC 97-342, 12 FCC Rcd 16436 (1997) (*Second Report and Order*); In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Order on Reconsideration of the Second Report and Order*, FCC 98-46, 13 FCC Rcd 8345 (1998) (*First Reconsideration Order*); In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Order on Reconsideration of the Second Report and Order*, FCC 99-66, 14 FCC Rcd 6571 (1999) (*Second Reconsideration Order*). We refer to these orders collectively as the *Restructuring Orders*.

[13] "Wireless Telecommunications Bureau Announces 1998 Election Date for Broadband PCS C Block Licensees; Payments for C and F Block Licensees Resume July 31, 1998," *Public Notice*, DA 98-471, 13 FCC Rcd 7413 (1998).

after which the licensee would be in default and its licenses would automatically cancel.[14]

5. NextWave sought and was denied a stay of the Election Date,[15] and did not file an election with the Commission. Therefore, under the Commission's rules, NextWave was deemed to have elected to resume payments under its existing Notes and Security Agreements.[16] On the same day as its election was due to the Commission, NextWave filed for protection under Chapter 11 of the Bankruptcy Code.[17] NextWave simultaneously filed an "Adversary Proceeding"[18] against the United States Government[19] asking the bankruptcy

---

[14] *See First Reconsideration Order*, 13 FCC Rcd at 8354-8355, ¶¶ 25-26. *See also* Sections 1.2110(f)(4)(ii), (iii), (iv) of the Commission's Rules, 47 C.F.R. §§ 1.2110(f)(4)(ii), (iii), (iv) (1999).

[15] *See NextWave Telecom v. FCC*, No. 98-1255 (D.C. Cir. June 11, 1998); In the Matter of Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998, Personal Communications Services C Block Election Date, *Order*, 13 FCC Rcd 11880, 11881, ¶ 5 (1998).

[16] *See* "Electronic Election Procedures for the Broadband Personal Communications Service (PCS) C Block Installment Payment Plans," *Public Notice*, DA 98-1006, 13 FCC Rcd 10364, 10366-10367 (1998). C block licensees were also informed that if they failed to make an election they would have to pay the entire Suspension Interest on or before March 31, 1998. *See Second Report and Order*, 12 FCC Rcd at 16471, ¶ 76.

[17] *In re NextWave Personal Communications, Inc. et al.*, 235 B.R. 263, 267 (Bankr. S.D.N.Y. 1998).

[18] *NextWave Personal Communications, Inc. v. FCC*, Summons and Notice of Pretrial Conference in an Adversary Proceeding, Adv.Proc. No. 98-5178A (Bankr. S.D.N.Y. June 8, 1998) ("*NextWave Complaint*").

[19] The United States Department of Justice represented the United States Government (*hereinafter* "the Government") in the bankruptcy proceeding.

court to restructure its debt to the United States based on the theory that its assumption of the full amount of the C block auction debt was a "fraudulent conveyance" under bankruptcy law.[20] On August 7, 1998, NextWave sent a letter to the Commission indicating its belief that bankruptcy afforded protections that "extend the date for making an Election" under the *Restructuring Orders*.[21] On September 2, 1998, the Wireless Bureau replied by letter that it disagreed, and considered the election requirements to be binding on NextWave, notwithstanding its bankruptcy filing ("*September 2, 1998 Letter*").[22] Pursuant to our *Restructuring Orders*, the C and F block licenses granted to NextWave canceled automatically on October 30, 1998 because Next-

---

[20] NextWave argued that its auction debt was voidable under the state fraudulent conveyance law of California, New York or the District of Columbia. *See NextWave Complaint*, *supra* at note 18. *See also* 11 U.S.C. § 544(b) (allowing the bankruptcy estate to "avoid" any "obligation incurred by the debtor that is viodable under applicable law"). NextWave did not contest the value of the F block licenses in the Adversary Proceeding.

[21] *See* Letter from Michael R. Wack, Vice President Regulation, NextWave Telecom Inc., to the Secretary, Federal Communications Commission, dated August 7, 1998.

[22] *See* Letter from Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, to Michael R. Wack, Vice President Regulation, NextWave Telecom Inc., dated Sept. 2, 1998. The Bureau Chief stated that "the rights to make an election are set forth in the Commission's *Second Report and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 97-82, 12 FCC Rcd 16436 (1997), *as modified by Order on Reconsideration of the Second Report and Order*, FCC 98-46 (released Mar. 24, 1998). We are unaware of any provision in the federal Bankruptcy Code or other statute, which, at this time, precludes application of the Commission's election requirements to [the Debtors]."

Wave failed to make its payment by the resumption deadline of October 29, 1998.[23]

6. In the bankruptcy proceedings, the Government opposed NextWave's attempt to use the Bankruptcy Code to retain its licenses without complying with the full and timely payment condition, and moved to dismiss the Adversary Proceeding as an improper collateral attack on our *Restructuring Orders*. The bankruptcy court rejected the Government's motion to dismiss the Adversary Proceeding, and ruled that on the fraudulent conveyance count, the Commission should be treated as a creditor, and not as a regulator.[24] On May 26, 1999, the bankruptcy court found that a constructive fraudulent transfer had occurred and, consequently, avoided approximately $3.7 billion of NextWave's aggregate $4.7 billion obligation to the Government.[25] The U.S. District Court for the Southern District of New York affirmed the bankruptcy court's decision on July 27, 1999,[26] but the United States Court of Appeals for the Second Circuit ("Second Circuit") reversed on November 24, 1999, and followed with an opinion on December 22, 1999 ("*December 22nd*

---

[23] *See First Reconsideration Order*, 13 FCC Rcd at 8354-8355, ¶¶ 25-26; 47 C.F.R. § 1.2110(f)(4)(ii) (1999).

[24] *See In re NextWave Personal Communications, Inc.*, 235 B.R. 263, 271 (Bankr. S.D.N.Y. 1998) (holding that the FCC's restructuring orders were not binding in bankruptcy proceedings).

[25] *See In re NextWave Personal Communications, Inc. v. FCC*, 235 B.R. 277 (Bankr. S.D.N.Y. 1999); *In re NextWave Personal Communications, Inc.*, 235 B.R. 305 (Bankr. S.D.N.Y. 1999).

[26] *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311 (S.D.N.Y. 1999).

Opinion").[27] In the *December 22nd Opinion*, the Second Circuit determined that the requirement that licensees comply with the full and timely payment condition in order to retain their licenses is regulatory in nature, because the auction is the mechanism used by the Commission to assign licenses under its statutory mandate in Section 309(j) of the Communications Act. Therefore, the Second Circuit found the bankruptcy court had erred in treating the Commission as merely a creditor. The Second Circuit concluded that the bankruptcy court lacked the power to alter the Commission's licensing scheme by changing the payment terms that applied to auction winners. In addition, the Court reversed the ruling that NextWave's obligation could be avoided as a fraudulent conveyance.[28] In its

---

[27] *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999), *petit. for panel reh'g and reh'g en banc denied* (Mar. 9, 2000) ("*NPCI*"). On June 9, 2000, NextWave filed a Petition for a Writ of Certiorari with the U.S. Supreme Court seeking review of the *December 22nd Opinion*. *NextWave Personal Communications, Inc., v. FCC*, Petition for a Writ of Certiorari (June 9, 2000). That Petition is pending.

[28] The Court agreed with the Government that the obligation to pay for licenses was incurred at the close of the auction, not at the time of subsequent license grant or note signing, as the bankruptcy court had found. *NPCI*, 200 F.3d at 62. On August 24, 2000, NextWave filed a Supplement in which it requested that the Commission take notice of *In Re: Kansas Personal Communications Service Ltd.*, Case No. 99-21747-11-JAR, Judgment on Decision (Bankr. D. Kan. Aug. 16, 2000), in which the bankruptcy court found that the automatic cancellation of licenses is stayed under the Bankruptcy Code. The Government has filed with the bankruptcy court its motion to stay the bankruptcy court's decision and notice of intent to appeal to the federal district court (United States' Emergency Motion for Stay Pending Appeal of the Memorandum Opinion and Order Denying Motion for Amendment of the Schedules and Statement of Financial Affairs and to Strike

December 22nd Opinion, the Second Circuit recognized that the bankruptcy court litigation had hindered the Commission's enforcement of its licensing payment rules against NextWave:

> Because of the ongoing litigation, the FCC has not yet sought to take any action vis-a-vis the Licenses. While it would probably be fair to assume that the FCC will seek to revoke the Licenses and collect on its debts, we cannot presume to know in advance the course that the agency will ultimately follow.[29]

7. Following the Second Circuit's decision, NextWave endeavored to amend its bankruptcy plan of reorganization by substituting full payment of its debt obligation for the reduced sum set by the bankruptcy court.[30] On January 12, 2000, the Government objected to the new reorganization plan, arguing that pursuant to the conditions of the C and F block licenses granted to NextWave, the licenses had automatically canceled when NextWave failed to make its required payments under the Commission's *Restructuring Orders*.[31] The Government's filing attached the *January 12th Public*

References to PCS Licenses (Bankr.D.Kan. Aug. 24, 2000) and Notice of Appeal and Statement of Election (Bankr. D. Kan. Aug. 28, 2000)). Having duly noted the bankruptcy court's decision and the Government's response thereto, we believe we need not consider that proceeding further in reaching a decision with respect to NextWave.

[29] *NPCI*, 200 F.3d at 59.

[30] *See Debtors' Modified First Amended Joint Plan of Reorganization, In re NextWave Personal Communications, Inc., et. al.*, No. 98B21529 (ASH) (Bankr. S.D.N.Y. Dec. 16, 1999).

[31] *See Objection of Federal Communications Commission To Debtors' Modified First Amended Joint Plan of Reorganization*, No. 98B21529 (ASH) (Bankr. S.D.N.Y. Dec. 21, 2000).

Notice in which the Commission announced the auction of various PCS licenses, including those previously conditionally granted to NextWave, on July 26, 2000 ("July 26th Auction").

8. In response to a motion filed by NextWave, the bankruptcy court subsequently issued an order holding that under the Bankruptcy Code, the FCC had no power to cancel NextWave's licenses ("*January 31st Bankruptcy Court Order*").[32] The bankruptcy court set forth its own interpretation of the FCC's rules and enjoined the FCC from going forward with the July 26th Auction. On February 10, 2000, upon the Government's motion for leave to file a petition for *writ of mandamus*, the Second Circuit stayed the *January 31st Bankruptcy Court Order* insofar as it precluded the Commission from taking steps in preparation for the auction, pending review of the mandamus petition, and established a briefing schedule to review the bankruptcy court's order. On May 25, 2000, the Second Circuit issued an opinion granting the *writ of mandamus* ("*May 25th Opinion*").[33] In the *May 25th Opinion*, the Second Circuit confirmed that bankruptcy provisions could not be used to collaterally attack the Commission's regulatory licensing scheme. The Court further explained that the Commission's rules requiring full and timely payment of installment obligations as a con-

[32] *In re NextWave Personal Communications, Inc.*, 244 B.R. 253 (Bankr. S.D.N.Y. 2000).

[33] *In re Federal Communications Commission*, Petitioner, Docket No. 99-5063, 2000 WL 828282 (2d Cir. May 25, 2000). On July 10, 2000, NextWave filed a petition for panel rehearing and a petition for rehearing en banc, in which it requested reconsideration of the *May 25th Opinion*. The Second Circuit denied these petitions on August 23, 2000.

dition to holding FCC licenses served a fundamental regulatory purpose, and therefore could not be altered in bankruptcy.

9. On February 11, 2000, while the mandamus proceedings were pending in the Second Circuit, NextWave filed the instant Petition for Reconsideration with the Commission challenging license cancellation on the grounds that it is arbitrary and capricious, contrary to law, and barred by the doctrines of estoppel and waiver. NextWave simultaneously filed a petition for review and notice of appeal before the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit"). On June 23, 2000, the D.C. Circuit granted the Commission's motion to dismiss NextWave's petition for review and notice of appeal on the grounds that they were premature in advance of this order ("*June 23rd Order*").[34] On July 5, 2000, NextWave filed a petition for rehearing of the *June 23rd Order*, which was denied by the D.C. Circuit on August 3, 2000.[35]

III. Discussion

10. *Procedural Issues.* In challenging the issue of cancellation in its Petition for Reconsideration, NextWave apparently takes the position that the *January 12th Public Notice* is a final order constituting a decision to cancel its previously-held licenses, rather than simply a public notice announcing the date that an

[34] *NextWave Personal Communications, Inc. and NextWave Power Partners, Inc. v. FCC*, 00-1045, 00-1046, *Order* (D.C. Cir. June 23, 2000).

[35] *NextWave Personal Communications Inc. and NextWave Power Partners, Inc. v. FCC*, 00-1045, 00-1046, *pet. for reh'g denied* (D.C. Cir. Aug. 3, 2000).

auction is scheduled to begin. While we believe that in some instances it may be proper for a party to challenge the Commission's public notices that establish or deny rights, the *January 12th Public Notice* was not an order or action of the Commission (or the Wireless Bureau) canceling NextWave's licenses. Pursuant to our rules, the licenses canceled automatically on October 30, 1998. Our records contain no timely challenge to the automatic cancellation rule by NextWave at the time of the rule's promulgation, nor did NextWave challenge the rule during the course of the proceedings culminating in the *Restructuring Orders*. NextWave did not file a request for waiver of the payment resumption deadline, as did several other parties.[36] Finally, NextWave could have filed a petition for reconsideration when the licenses canceled on October 30, 1998, but did not.[37] Thus, we believe NextWave's Petition to be late and its challenge to the *January 12th Public Notice* to be procedurally defective.[38] Nevertheless, because of

---

[36] *See* In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Order*, 13 FCC Rcd 22071 (1998) ("*Extension Request Order*"), *aff'd on recon.*, In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Memorandum Opinion and Order*, 14 FCC Rcd 6080 (1999) ("*SouthEast MO&O*"), *aff'd*, *SouthEast Telephone v. FCC*, No. 99-1164, 1999 WL 1215855 (D.C. Cir. Nov. 24, 1999) ("*SouthEast Telephone*").

[37] We do not mean to suggest that such a request would have been appropriate, only that it would have been procedurally permissible. *See also* ¶¶ 15 and 16, *infra*.

[38] We note that although it had no occasion to decide the question, the Second Circuit stated its belief that the *January 12th Public Notice* is an appealable decision or order, for the purpose of Commission and judicial review. *See May 25th Opinion*, note 29. The Court cited *Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d

the importance of the issues raised in NextWave's Petition, we address NextWave's challenge to the automatic cancellation of its licenses.[39]

11. *Arbitrary and Capricious Standards.* NextWave argues that the automatic cancellation of its licenses and *January 12th Public Notice* were arbitrary and capricious and contrary to reasoned decision-making[40] because the Commission has violated its own

---

512, 522 (D.C. Cir. 1999) ("*Mountain Solutions*") for the proposition that the Commission's treatment of the denial of a waiver request is an adjudicatory decision. In that case, Mountain Solutions requested a waiver of the Commission's rules governing the deadline for down payments. The Commission denied the waiver request in an appealable order. *See* In the Matter of Mountain Solutions Ltd., Inc. Emergency Petition for Waiver of 24.711(a)(2) of the Commission's Rules Regarding Various BTA Markets in the Broadband Personal Communications Services (PCS) C Block Auction, *Memorandum Opinion and Order*, 13 FCC Rcd 21983, 21997, ¶ 26 (1998). We believe that *Mountain Solutions* is procedurally inapposite to the case before us because NextWave is not requesting reconsideration of an order, but rather, reconsideration of a public notice establishing a date to auction licenses for spectrum previously licensed to it. Furthermore, as discussed above, Mountain Solutions had requested a waiver of the rule, which NextWave has not done.

[39] *See* In The Matter Of Additional Information Regarding Broadband PCS Spectrum Included in the Auction Scheduled for March 23, 1999, *Order*, 14 FCC Rcd. 6561, 6562, ¶ 3 (1999) (Commission considered an application for review of a public notice establishing an auction date despite the procedural deficiency of the application).

[40] The Supreme Court has stated that "[n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed

regulations and departed from consistent prior practice by "purporting" to cancel NextWave's licenses without any previous declaration that NextWave had defaulted on its installment payments.[41] We disagree. Cancellation is fully consistent with our congressional mandate, the Commission's regulations, and precedent. As the D.C. Circuit has recognized in a related context, the Commission has given "fair notice of the importance it attached to meeting payment dates . . . ."[42] The necessary corollary to this requirement is that licenses cancel if timely payment is not made. The requirement to pay in full and on time is paramount to preserve the reliability and integrity of our auction licensing program. Furthermore, the Commission has designed its competitive bidding system with the goal of awarding licenses expeditiously to bring competitive wireless services to the public without undue delay.[43] Providing for the "automatic" cancellation of licenses for nonpayment is designed to permit the most expeditious auction of spectrum licenses in furtherance of this goal.

---

to a difference in view or the product of agency expertise." *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

[41] *See* NextWave Petition at 9-10.

[42] *Mountain Solutions*, 197 F.3d at 522 (relating to default rules for downpayments applied to C block bidders).

[43] *See* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2349, ¶¶ 4-5 (1994). We also note that Section 309(j)(3)(A) of the Communications Act, as amended, requires that the Commission pursue "the development and rapid deployment of new technologies, products, and services for the benefit of the public . . . without administrative or judicial delays." 47 U.S.C. § 309(j)(3)(A).

12. NextWave's argument that cancellation is arbitrary and capricious ignores the multitude of Commission pronouncements that licenses would cancel automatically if the applicable installment payments were not timely received by October 29, 1998. At the time that NextWave was conditionally granted its licenses, the payment rules provided that a license would cancel automatically following the expiration of any grace period without the successful resumption of payment or upon default with no grace period.[44] As noted above, the full and timely payment condition was explicitly stated on the face of each license[45] and referenced in the Notes and Security Agreements that memorialized the payment terms and obligations applicable to each license.[46] The *First Reconsideration*

---

[44] 47 C.F.R. § 1.2110(e)(4)(iii) (1997).

[45] Each C and F block license issued to NextWave expressly stated that "[t]his authorization is conditioned upon the full and timely payment of all monies due pursuant to Sections 1.2110 and 24.711 of the Commission's Rules and the terms of the Commission's installment plan as set forth in the Note and Security Agreement executed by the licensee. Failure to comply with this condition will result in the automatic cancellation of this authorization." *See, e.g.*, C block License at 2.

[46] For example, the Note signed by NextWave for each C and F block license it received stated at 3:

> The Maker hereby acknowledges that the Commission has issued Maker the above referenced License pursuant to the Communications Act of 1934, as amended, that it is conditioned upon full and timely payment of financial obligations under the Commission's installment payment plan, as set forth in the then-applicable orders and regulations of the Commission, as amended, and that the sanctions and enforcement authority of the Commission shall remain applicable in the event of a failure to comply with the terms and conditions of the License,

Order amended the rules to provide that C and F block licensees must resume payment by July 31, 1998, and that "C and F block licensees shall be in default if their payment due on the resumption date . . . is more than ninety (90) days late" (*i.e.*, after October 29, 1998).[47]

13. In addition to the rules and orders issued by the Commission, the Wireless Bureau issued a series of public notices that gave Commission licensees specific instructions regarding the dates that payments were due and the consequences of non-compliance. In a Public Notice released on April 17, 1998, the Wireless Bureau stated that licensees who failed to meet the July 31, 1998, payment resumption deadline could submit their payment on or before October 29, 1998, without being considered delinquent, if they timely paid a five percent late fee.[48] In a Public Notice dated September 18, 1998, the Wireless Bureau emphasized that licensees that miss the late payment deadline

---

regardless of the enforceability of this Note or the Security Agreement.

[47] *See First Reconsideration Order*, 13 FCC Rcd at 8354-8355, ¶¶ 25-26. The Commission established the dates for installment payment resumption in "Wireless Telecommunications Bureau Announces 1998 Election Date for Broadband PCS C Block Licensees; Payments for C and F Block Licensees Resume July 31, 1998," *Public Notice*, DA 98-741, 13 FCC Rcd 7413 (1998) ("*1998 Election Date Notice*"). *See also* 47 C.F.R. §§ 1.2110(f)(4)(iii), (iv) (1999).

[48] *See 1998 Election Date Notice.* To assist in making elections, the Commission sent to each C block licensee a statement of current account balances. NextWave received the pre-election notice sent to all C block licensees.

would be in default and their licenses would automatically cancel.[49]

14. Beyond these public notices, the Wireless Bureau's *September 2, 1998 Letter* directly informed NextWave that the Commission took the position that NextWave's pending bankruptcy case did not relieve it of its regulatory obligations under the Commission's *Restructuring Orders*.[50] After the *September 2, 1998 Letter*—nearly two months before the final payment date—it would have been unreasonable for NextWave to believe that the Commission expected it to make the election required by the *Restructuring Orders*, but not to make the concomitant payments required pursuant to that election and specified in the *Restructuring Orders*. Thus, NextWave could not reasonably have assumed that the Commission agreed with its position that its bankruptcy filing freed it from its regulatory obligations, such as the timely payment requirement.

---

[49] *See* "Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules," *Public Notice*, DA 98-1897, 13 FCC Rcd 18213 (1998).

[50] *See supra* at note 22. The *September 2, 1998 Letter* is consistent with our longstanding statements regarding compliance with regulatory requirements by Commission licensees in bankruptcy. For example in paragraph 135 of the Fifth Memorandum Opinion and Order in the competitive bidding docket (PP Docket No. 93-253), 10 F.C.C. 403 (1994), we noted that a designated entity with installment payments that went into bankruptcy would be able to transfer its license through a bankruptcy court sale only if it had maintained its installment payments during the bankruptcy (or had obtained a Commission-granted grace period), and otherwise complied with our regulatory requirements for designated entities. Nothing in the Commission's language suggests that these requirements are suspended or abrogated by a bankruptcy filing.

15. Recognizing that the cancellation of NextWave's licenses occurred automatically under our rules on October 30, 1998 is, in fact, fully consistent with our treatment of similarly situated C block licensees. As noted above, in October 1998, immediately prior to the payment resumption deadline, a number of licensees claimed to be facing serious financial difficulties, notwithstanding the relief we had provided in our *Restructuring Orders*. Those licensees filed requests for waiver of the October 29, 1998 payment deadline.[51] In our *Extension Request Order*, we declined to further extend the deadline, noting that we had already provided a lengthy suspension period and explaining that to extend the deadline still further would "only serve to undermine the enforcement of [our] payment deadlines."[52] Subsequent to that order, two of the five licensees that had requested waivers made the requisite payment, whereas SouthEast Telephone, Inc., and Wireless Ventures, Inc. lost their licenses by operation of the automatic cancellation rule.[53] The Wireless Bureau did not issue a "declaration" of default, but simply released a public notice announcing its intention

---

[51] Airadigm Communications, Inc., Urban Comm-North Carolina, Inc., SouthEast Telephone, Inc., Wireless Ventures, Inc., and Personal Communications Network, Inc. all filed requests for waiver of the October 29, 1998 deadline.

[52] *Extension Request Order*, 13 FCC Rcd at 22073, ¶ 5.

[53] Urban Comm-North Carolina, Inc. filed for bankruptcy under Chapter 11 of the Bankruptcy Code (Case No. 98-B-10086, Bankr. S.D.N.Y. 1998), and also filed a fraudulent conveyance action seeking to reduce the amount of its debt for the licenses (Adv.Pro. No. 99-8125 Bankr. S.D.N.Y. 1999). As in the case of NextWave, the Government has taken the position that the licenses issued to Urban Comm-North Carolina canceled for failure to make the October 29, 1998 payment.

to include the spectrum previously licensed to South-East and Wireless Ventures in our March 23, 1999 auction.[54]

16. The only material differences of which we are aware between NextWave and these companies are that NextWave was in bankruptcy some months prior to the resumption deadline, and NextWave did not seek a waiver of the payment deadline. Had NextWave filed for a waiver at that time, we are not aware of any basis on which relief would have been afforded to it and not the other licensees that did request equitable relief.[55] To now decline to enforce the automatic cancellation of NextWave's licenses would provide NextWave, retroactively, with just the relief that we declined to provide to those that had properly requested it. Such a result would be unjustified.[56]

---

[54] *See* "C Block PCS Spectrum Auction Scheduled for March 23, 1999; Comment Sought on Procedural Issues," *Public Notice*, DA 98-2318, 13 FCC Rcd 24947 (1998). SouthEast's challenge to our denial of its waiver request was ultimately rejected by the D.C. Circuit on November 24, 1999. *See SouthEast Telephone*, *supra* at note 36.

[55] Even now NextWave has not utilized the appropriate vehicle of requesting a waiver or other equitable relief. We do not undertake in this order to address the adequacy of a request that has not been made. Our purpose is merely to illustrate that the cancellation of NextWave's licenses is consistent with the treatment of others similarly situated.

[56] In failing to pay despite the automatic cancellation rule, NextWave apparently was relying on the automatic stay of the Bankruptcy Code. That reliance was erroneous. *See, e.g., May 25th Opinion*, at 32-35 (holding that the timely payment condition is regulatory, and therefore the automatic stay does not apply). We are not aware of any precedent supporting the proposition that

17. NextWave argues that before there can be an automatic cancellation of a license, the Commission must "declare" that the licensee was in default under its payment obligations and that such a declaration was not made in this instance. The Commission did not contemplate a separate individual "declaration" to achieve "automatic" license cancellation, especially for C and F block licensees. C and F block payments had been suspended for over a year. The Commission therefore had a strong interest in ensuring that the spectrum would be returned quickly if licensees did not have the financial ability to meet the payment obligations established by their winning bids at the auction. At the time NextWave defaulted on its payment obligations, the licenses, notes, security agreements, and operative Commission rules all called for "automatic cancellation" upon a payment default.[57] Section 1.2110(f)(4)(iv) of the Commission's rules provided that if the payment obligations are missed the licensee "will be declared in default, its licenses will automatically cancel, and will be subject to debt collection procedures."[58] This rule does not require a distinct,

---

a waiver is warranted, retroactively, on account of mistaken reliance on an inapplicable provision.

[57] *See* 47 C.F.R. § 1.2110(f)(4)(iv) (1998).

[58] Recently the Commission restated this rule as follows: "[i]f an eligible entity obligated to make installment payments fails to pay the total Required Installment Payment within two quarters (6 months) of the Required Installment Payment due date, it shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures." *See* In the Matter of Amendment of the Commission's Rules—Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of*

affirmative act, involving a separate "declaration" of default for each licensee that has missed a payment as a precursor to automatic license cancellation. Indeed, to require that the Commission take affirmative steps to declare a licensee in default before the operation of the cancellation of the license would render the automatic nature of the process futile and meaningless. Nor, as explained above, have we followed the practice of issuing a separate declaration of default in prior cases.[59] For all these reasons, we reject NextWave's interpretation of our default and cancellation rules and reaffirm that the failure to make full payment in a timely manner following exhaustion of all applicable grace periods constitutes a default, and results in the automatic cancellation of the license without further Commission action.

Proposed Rule Making, FCC 00-274 (rel. August 14, 2000), ¶ 28 (*Part 1 Reconsideration Order*).

[59] NextWave offers no case in which the Commission has issued a separate formal "declaration" of default before the license cancellation rules were applied. To the extent that NextWave relies on a letter from Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Div., Wireless Telecommunications Bureau, to Jack Bond, Mountain SMR Group, L.L.C., DA 98-378, 13 FCC Rcd 4504 (1998) (*Mountain SMR*), to support its position that a separate "declaration of default" is required, its argument is misplaced. In *Mountain SMR*, a winning bidder in an SMR service auction failed to make its required down payment, and requested waiver of the Commission's bid withdrawal and down payment rules. The staff issued a decision in which it denied the requests for waiver and specified the amount of default payment that was due pursuant to Sections 90.905(b) and (c) of the Commission's rules. In the course of the decision, the staff stated that because Mountain SMR missed its down payment, it was "deemed to be in default" on these obligations. *Id* at 4508. The plain purpose of the staff letter was not to declare a default, but to deny the waiver request and specify the amount of payments due as a result of the default.

18. In a August 11th Supplemental filing, NextWave calls our attention to *Trinity Broadcasting of Florida v. FCC*,[60] where the D.C. Circuit held that we had failed to provide adequate notice of the interpretation of our minority ownership rules that we sought to apply to Trinity. NextWave argues that our rules did not clarify that cancellation could occur without a prior declaration of default. The interpretation urged by NextWave is not a reasonable one and could not reasonably be relied upon.[61] Even if it were reasonable to read the rule this way, NextWave could not have relied upon the alternative interpretation it urges. Whether cancellation was "automatic," or would require a prior "declaration," it was certainly clear that the consequence of NextWave's failure to pay on time would be nothing less than the loss of its licenses. NextWave could not have been waiting for a declaration of default, because, even under its interpretation, such a declaration would itself trigger automatic cancellation without recourse to NextWave. Thus, the only way that NextWave could have avoided the loss of its licenses, even under the rule interpretation it urges, was to avoid a default by making full and timely payment on or before the

[60] 211 F.3d 618 (D.C. Cir. 2000).

[61] NextWave's suggested alternative interpretation of our rules —that a licensee making a "partial" payment would be subject to automatic cancellation, while a licensee that misses a payment entirely would be protected from automatic cancellation—is obviously not a reasonable one. *See* August 11th Supplemental filing at 2. Moreover, as we have already stated, automatic cancellation was specified on the face of its licenses, and in the Notes and Security Agreements executed by NextWave.

payment due date, which it unquestionably failed to do.[62]

19. We also reject NextWave's argument that automatic cancellation and the *January 12th Public Notice* are inconsistent with the Wireless Bureau's decisions in a series of non C block cases—specifically, the *Lancaster Communications*,[63] *Cordell Engineering*,[64] *TE-MCG*,[65] and *Ivan Brisbin*[66] cases. In *Lancaster*

[62] Nor does *Trinity* support NextWave's argument that the Commission was required to inform NextWave specifically that the automatic stay would not override FCC licensing regulations. *Trinity* concerned differing interpretations of Commission rules, not the interaction of our rules with other federal law. In any event, NextWave's argument ignores the Government's consistent position taken throughout the litigation, that NextWave's bankruptcy case represented an impermissible collateral attack on our *Restructuring Orders* and our authority to place conditions on FCC licenses. NextWave also ignores the *September 2, 1998 Letter*, which, as discussed elsewhere, did inform NextWave directly (and before cancellation actually occurred) of the Commission's rejection of NextWave's position that its bankruptcy filing precluded enforcement of our *Restructuring Orders*. For these reasons, NextWave's reliance on *Trinity* is unavailing.

[63] *See* Letter from Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, to Thomas Gutierrez, Esq., Counsel for Lancaster Communications, Inc., DA 98-2052, 1998 WL 709412 (FCC) (rel. Oct. 9, 1998) (*Lancaster Communications*).

[64] Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Meredith S. Senter, Jr., Esq., Counsel for Cordell Engineering, DA 99-277, 14 FCC Rcd 5003 (1999) (*Cordell Engineering*).

[65] Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, to Lloyd W. Coward, Esq., Counsel for TE-MCG Consortium, DA 99-258, 14 FCC Rcd 2173 (1999) (*TE-MCG*).

[66] In the Matter of Ivan Brisbin (Call Sign WPCB813) Request for Waiver of Section 90.149(a) of the Commission's Rules, *Order*

Communications, *Cordell Engineering* and *TE-MCG*, the Commission, as a result of an administrative oversight, accepted payments from the licensees after the payment deadlines had passed, thereby constructively waiving the installment payment deadlines so that the licenses at issue did not cancel. The Commission is not required to repeat previous errors in order to maintain consistency with precedent.[67] Moreover, in this case, the Commission has not acted in such a way that reasonably could be construed as constructively waiving the October 29, 1998, late payment deadline.

20. Moreover, it is significant that in *Lancaster Communications*, *Cordell Engineering*, and *TE-MCG*, the parties were not C or F block licensees and were not affected by the extraordinary measures the Commission took to facilitate payment by such licensees.[68] In attempting to accommodate the needs of the C Block licensees in the *Restructuring Orders*, the Commission reiterated its belief that the ability to make installment payments is evidence of licensees' ability to access the capital necessary to both pay for the licenses and provide service to the public.[69] Having allowed C and F block licensees to defer any installment payments for more than a year, the Commission took the position that it would strictly enforce the resumption deadline, and not permit any further extensions.[70] In these circumstances, it is hardly arbitrary or capricious for the Commission to recognize the applicability of its automatic cancellation rules to a licensee that failed to make a payment by the resumption deadline. As a party in the C block restructuring proceedings, NextWave certainly knew that we intended to strictly enforce the October 29, 1998 payment deadline, particularly in light of the year of suspension of payments already afforded to C block licensees.[71]

21. *Ivan Brisbin* is also inapposite. There, the Commercial Wireless Division granted a late request for waiver of the Commission's rules establishing license renewal terms for Specialized Mobile Radio (SMR) licensees[72] and reinstated its license on the grounds that

---

on Reconsideration, DA 00-59, 15 FCC Rcd 724 (2000) (*Ivan Brisbin*).

[67] The D.C. Circuit recently rejected a similar argument presented by SouthEast Telephone, after its licenses automatically canceled when it failed to make the required payment by October 29, 1998. *See SouthEast Telephone*, *supra* at note 36. SouthEast, like NextWave, relied on *TE-MCG* in arguing that the Commission was acting improperly when it enforced its timely payment rules because the Commission had granted waivers of late payments to some licensees in the past in other, non-PCS, services. The D.C. Circuit understood that these past instances were "based in part on the FCC's inadvertent acceptance of late payments and resulting constructive waiver of the payment deadlines" and the Court concluded that in these circumstances, "the mere fact that the agency granted TE-MCG's request does not require it to grant petitioner's request." *Id.* at 1. As the Court recognized, an agency is not required to continue to repeat its past errors in order to remain consistent with past decisions. *Id. See also Chem-Haulers, Inc. v. ICC*, 565 F.2d 728, 730 (D.C. Cir. 1977); *Texas International Airlines v. CAB*, 458 F.2d 782, 785 (D.C. Cir. 1971).

[68] *See Restructuring Orders*, *supra* at note 12.

[69] *See First Reconsideration Order*, 13 FCC Rcd at 8348, ¶ 8.

[70] The Commission clearly stated that it would "not entertain any requests for an extension" beyond the payment resumption date. *See Second Report and Order*, 12 FCC Rcd at 16451-16452, ¶ 30. *See also Extension Request Order*, *supra* at note 36.

[71] *See, e.g., Extension Request Order*, *supra* at note 36; *SouthEast Telephone MO & O*, *supra* at note 36.

[72] *See* 47 C.F.R. § 90.149(a) (1998).

the licensee had completed construction and had been operating over the course of the license term. The full and timely payment rules, applicable to NextWave, were not at issue in *Ivan Brisbin*, which was not a payment default case. Moreover, because NextWave is not in commercial operation, its case does not present the same public interest concerns, *i.e.*, the uninterrupted provision of service, that informed the Wireless Bureau's decision in *Ivan Brisbin*.

22. NextWave also contends that in asserting cancellation, the Commission departed without explanation from the consistent course of conduct it followed in the NextWave bankruptcy proceedings, particularly in regard to an agreement reached in principle between the Government and Nextel Communications, Inc. ("Nextel") to settle the NextWave bankruptcy. The circumstances surrounding this agreement demonstrate that NextWave's contention is erroneous. The Government consistently maintained throughout the litigation that NextWave's Adversary Proceeding represented a collateral attack on the *Restructuring Orders*. The bankruptcy court, however, rejected this position and ruled that NextWave could retain its licenses for significantly less than its winning bid at auction. The Government appealed. Thereafter, the bankruptcy court allowed NextWave's reorganization efforts to proceed. Until resolution of that appeal, the Government appropriately entertained settlement proposals.[73] Settlement discussions do not constitute an admission

[73] Until the Second Circuit's decision in December 1999 (and later affirmed in May 2000), the Commission was bound by the law of the case and was prevented from enforcing cancellation. *See* ¶ 6 *supra*.

that the positions that a party has maintained and continues to press in the litigation are incorrect.

23. NextWave also argues that in enforcing the automatic cancellation rules, the Commission failed to consider the significant congressional policy judgments that are embodied in the Bankruptcy Code, including equality of distribution among creditors, a fresh start for debtors and the efficient and economical administration of cases, or to attempt to weigh those judgments against the Commission's own policy objectives. We have, in fact, made the assessment that NextWave seeks. Our consistent position throughout the bankruptcy litigation reflects just the sort of consideration that NextWave complains to be lacking. As we explain below, even when these bankruptcy policies are considered, the public interest is best served by enforcing our automatic cancellation rules against NextWave. Indeed, the D.C. Circuit has stated that "the Commission should assure that licensees do not use bankruptcy as a means of circumventing their obligation to operate in the public interest."[74]

24. In making public interest assessments under the Communications Act we take into account the policies embodied in other federal statutes, including the Bankruptcy Code.[75] We have fully considered the policies

[74] *See LaRose v. FCC*, 494 F.2d 1145 at 1146 n.2 (D.C. Cir. 1974) (*LaRose*).

[75] *See LaRose v. FCC*, 494 F.2d at 1146 n.2, 1147-1148; *Second Thursday Corp.*, 22 FCC2d 515 at 516, ¶ 5 (1970); *Telemundo, Inc. v. FCC*, 802 F.2d 513 at 518 (D.C. Cir. 1986). *See also* In the Matter of Mobilemedia Corporation, et.al., *Memorandum Opinion and Order*, 14 FCC Rcd. 8017 (1999); In re Application of San Diego Television, Inc., Debtor-in Possession, *Memorandum Opinion and*

embodied in the Bankruptcy Code as presented by NextWave and find that the public interest in maintaining the integrity of the licensing process through auctions, the need to ensure that licenses are allocated to those licensees that are best qualified to hold them, and our desire to in this way further competition in the marketplace outweigh NextWave's individual business interests and those of its creditors.[76] Furthermore, the preservation and protection of the public interest in facilitating the goals of the Communications Act of 1934 as set forth in Section 309(j) are decisive here.[77] Section 309(j) embodies a presumption that licenses should

---

Order, 11 FCC Rcd 14689, 14693 ¶ 13 (1996) (*San Diego*); In re Application of Various Subsidiaries and Affiliates of Geotek Communications, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 790, 809 n.90 (2000).

[76] While under *LaRose* we are to consider ways in which our rules can be enforced without harming innocent creditors, we believe *LaRose* to be inapplicable under the instant facts. *LaRose* concerned an application to transfer existing licenses, and a decision by the Court that creditors should not be penalized for the malfeasance of the licensee's operators or principals. Unlike *LaRose*, all creditors of NextWave, and of other C block licensees, should have understood that the maintenance of their investment was contingent on their company's ability to pay the winning bid price as provided in our rules. Indeed, it is likely that creditors of other licensees did lose their investment as a result of the operation of our rules. We do not believe it would be appropriate to decline to apply our rules governing cancellation, and thereby eviscerate our regulatory scheme for assigning licenses, in order to protect NextWave's creditors from a known risk that they undertook at the time they invested.

[77] In addition, Section 308(b) the Communications Act of 1934, as amended, states that "the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station." 47 U.S.C. § 308(b).

be allocated as a result of an auction to those who place the highest value on the use of the spectrum. Such entities are presumed to be those best able to put the licenses to their most efficient use. If licensees were allowed to adjust their winning bid obligations after the fact in bankruptcy, the result of the auction would be negated, and the integrity of the auction process would be completely undermined. The winning bidder would be allowed to retain licenses despite having lost the above presumption. Nor would this be fair to those who: 1) participated in the auction but were outbid by NextWave; 2) would like an opportunity to bid on the licenses now, and; 3) perhaps most importantly, complied with our *Restructuring Orders*. Some of the licensees that complied with our orders actually forfeited their licenses because they could not ultimately meet their bid obligations; the balance either returned spectrum pursuant to our *Restructuring Orders* or made their installment payments as required. It would be unfair to permit a licensee that could not satisfy its bid to file for bankruptcy, tying up the spectrum in the process, and then emerge from bankruptcy at some later time and retain the licenses, while others that complied with our rules lost their licenses.

25. Congress gave the Commission the authority to auction radio spectrum licenses in order to facilitate the fulfillment of its mandate, which is, *inter alia*, to promote the rapid deployment of new technologies, products, and services to the American public while recovering for the public the value of that spectrum.[78] In order to implement the auction program, Congress delegated to the Commission the authority to make the

---

[78] 47 U.S.C. § 309(j)(3).

rules by which the program operates, including the payment rules. Strict enforcement of payment rules enhances the integrity of the auction and licensing process by ensuring that applicants have the necessary financial qualifications and that spectrum is awarded to those qualified bidders who value the spectrum most. Insisting that licensees demonstrate their ability to pay as a condition to holding licenses is essential to a fair and efficient licensing process, is fair to all participants in our auctions, including those who won licenses in the auctions and those who did not, and fosters the promotion of economic opportunity and competition in the marketplace. NextWave is providing no service. The spectrum licensed to NextWave has gone unused since early 1997 and represents licenses in 90 markets across the United States. Since the cancellation and the *January 12th Public Notice*, there has been an overwhelming interest in this spectrum.[79] NextWave's failure to utilize the spectrum and its attempts to shield the spectrum in bankruptcy have hindered the growth of innovative and competitive telecommunications services in many areas of the United States, to the detriment of the American public. Under the circumstances presented, and on balance, we cannot accommodate the policies embodied in the Bankruptcy Code without causing undue harm to the integrity of our

[79] *See* Comments filed on June 22, 2000, by Alpine PCS, Inc., America Connect, Inc., BellSouth Corporation, Carolina PCS I Limited Partnership, Nextel Communications, Inc., Rural Telecommunications Group *et al.*, Twenty First Wireless, Inc., and Verizon Wireless in response to In the Matter of Amendment of the Commission's Rules Regarding Payment Financing for Personal Communication Services (PCS) Licensees, WT Docket No. 97-82, *Further Notice of Proposed Rulemaking*, FCC 00-197 (rel. June 7, 2000).

auction and licensing process and further harming the public's interest in the efficient deployment of telecommunications services.

26. *Application of Federal Bankruptcy Laws.* NextWave argues that the release of the *January 12th Public Notice* violates Sections 362(a), 525, 1123, and 1124 of the Bankruptcy Code. To the extent NextWave argues that the Bankruptcy Code operates to preclude license cancellation under our rules, that argument has been summarily rejected by the Second Circuit and is precluded under the doctrine of *res judicata*.[80]

27. *Estoppel and Waiver.* NextWave claims that the Commission is barred by the doctrines of equitable estoppel, judicial estoppel, and waiver from asserting that its licenses have canceled.[81] NextWave asserts that the Commission did not seek payments from it and did not send quarterly notices of payment obligations, specifying the outstanding balance of the debt. NextWave also cites to statements made by Department of Justice attorneys in the bankruptcy case, which NextWave claims led it and its investors to believe that the Commission was taking the position that it could not cancel licenses during the pendency of the bankruptcy case. We note that these arguments were made

[80] We note that NextWave has argued to the D.C. Circuit in its now-dismissed petition for review and its papers relating to the motion to dismiss that these questions were not decided by the Second Circuit. We disagree. We do not read the Second Circuit's *May 25th Opinion* as an invitation to argue before us or the D.C. Circuit the applicability of various Bankruptcy Code provisions.

[81] *See* NextWave Petition at 19-20.

to the Second Circuit, and were responded to by the Government.[82]

28. The party seeking to raise the defense of equitable estoppel must first establish the following elements: (1) the party to be estopped must be aware of the facts; (2) the party to be estopped intended his act or omission to be acted upon; (3) the party asserting estoppel did not have knowledge of the facts; and (4) the party asserting estoppel reasonably relied on the conduct of the other to his substantial injury.[83] In addition to these elements, a private litigant seeking to estop the government bears a heavy burden. Estoppel will not lie unless the party can show affirmative misconduct by the government[84] that goes beyond mere negligence, delay, inaction or failure to follow internal agency guidelines[85]; erroneous oral and written advice given by a lower level official is not sufficient.[86] None of these prerequisites is satisfied here.

29. The Commission did not act in a manner that would have led NextWave reasonably to believe that its licenses would not cancel if it failed to make timely payment. In fact, NextWave had ample notice to the contrary. As discussed above, outside the bankruptcy

---

[82] *See In re: Federal Communications Commission*, Case No. 99-5063, Petition for a Writ of Mandamus (2nd Cir. February 22, 2000), pp.36-46 (*Mandamus Petition*).

[83] *See Mangaroo v. Nelson*, 864 F.2d 1202, 1204 (5th Cir. 1989).

[84] *Drozd v. INS*, 155 F.3d 81, 90 (2d Cir. 1998).

[85] *Ingalls Shipbuilding, Inc. v. U.S. Dept. of Labor*, 976 F.2d 934, 938 (5th Cir. 1992).

[86] *Office of Personnel Management v. Richmond*, 496 U.S. 414, 415-416 (1990); *see also Deaf Smith County Grain Processors v. USDA*, 162 F.3d 1206 (D.C. Cir. 1998).

context we have consistently stressed the importance of the full and timely payment condition as set forth in our rules and on the face of the licenses themselves. Under our *Restructuring Orders* it was clear that payments must resume by October 29, 1998, at the latest, to prevent cancellation, and requests by similarly situated parties to waive the payment resumption deadline were denied. In the bankruptcy case, the Government's consistent position was that NextWave could not use bankruptcy to collaterally attack our *Restructuring Orders*. The *September 2, 1998 Letter* reiterated to NextWave our position that the filing of bankruptcy did not relieve it of its regulatory obligations. It is true that NextWave argued repeatedly in court that the obligation to pay is not "regulatory," but the Government argued just as forcefully that the full and timely payment requirement is a critical regulatory condition. Given these circumstances, we do not think NextWave could reasonably have believed that we agreed with its position that the bankruptcy filing precluded enforcement of our licensing rules.

30. Turning to NextWave's specific assertions, the fact that NextWave did not receive payment notices after the bankruptcy case was filed does not establish waiver or estoppel. At the time that the payment was due, October 29, 1998, NextWave already knew from our *Restructuring Orders*, the Wireless Bureau's public notices, and the Commission's orders rejecting requests for extension of time to pay by other C-block licensees, that the Commission had established October 29, 1998 as the final due date for payments under the *Restructuring Orders*. NextWave also received the *September 2, 1998 Letter* nearly two months before payment was due. Given these formal and informal statements,

NextWave did not need a separate notice that its payments were due by October 29 in order to understand the Commission's position that it was obligated to comply with the Commission's rules regardless of the bankruptcy filing. The practice of sending out individual notice is not mandated by any Commission rule, and the fact that no special additional notice was sent to NextWave during the pendency of the bankruptcy case of the amount due does not meet the prerequisites of waiver or estoppel. As a Commission licensee, NextWave was responsible for making timely payment on the dates set by the Commission, without individual notice of payment due.[87]

31. NextWave argues that the Commission is estopped from asserting cancellation because of selected quotes from statements made by DOJ attorneys in court regarding the operation of the Bankruptcy Code. We do not find that any of these statements, taken individually or collectively, constitute an estoppel. *First*, nowhere in the statements quoted by NextWave does a DOJ attorney state that NextWave could miss a payment and still retain its licenses. *Second*, NextWave takes the selected DOJ attorney statements out of context. All of the statements were made during the course of ongoing litigation in which the Government's consistent position was that NextWave could not modify the terms and conditions of the Commission's licenses, including specifically the condition of full and timely payment. Given that express

[87] *See also* Letter from Louis Sigalos, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to James A. LaBelle, 21st Century Telesis, Inc., DA 00-1791 (Aug. 7, 2000).

position, NextWave could not have reasonably assumed from any of the quoted DOJ attorney statements that NextWave could ignore the payment deadlines prescribed by the Commission's rules without peril to its licenses if the Government's position ultimately prevailed.[88] Notably, many of the DOJ attorney statements quoted by NextWave were made long after the October 29, 1998 payment deadline, and long after any arguable 60-day extension of the deadline under Section 108 of the Bankruptcy Code. NextWave could not possibly have relied on these post-deadline statements for its decision to fail to comply with the full and timely payment condition. *Third*, before the October payment deadline, NextWave received directly from the Commission the *September 2, 1998 Letter*, which made it clear that the Commission intended to enforce its *Restructuring Order* deadlines regardless of the bankruptcy filing. *Finally*, as a matter of law, a lawyer's passing remark is not a basis for estopping a federal

[88] As the Government explained in its *Mandamus Petition*, at p. 38, there is nothing inconsistent between Government counsel's statements and the distinction drawn in Section 362(b)(4) of the Bankruptcy Code between an agency's forbidden efforts to collect money payments and its permissible exercise of regulatory authority. Indeed, counsel's statements are consistent with the Second Circuit's observation that, "if the FCC chooses to pursue . . . collection . . . it may find itself acting as a creditor." *NPCI*, 200 F.3d at 59 n.15. Thus, the statement that the automatic stay would preclude affirmative efforts to collect license payments did not suggest that the automatic stay would preclude operation of the Commission's rules respecting automatic cancellation for failure to comply with license conditions.

regulatory agency from enforcing its rules in the public interest.[89]

32. For the same reasons set forth above, the Commission is not judicially estopped. The Commission's consistent position in the litigation has been that the Commission's licensing rules and conditions remain applicable to NextWave notwithstanding its bankruptcy filing. Accordingly, the Commission's actions in recognizing the cancellation of the licenses for nonpayment and in announcing an auction of PCS C and F block licenses, including those NextWave previously held, are not inconsistent with any of its statements before the courts.

33. In its August 11th Supplement, NextWave relies on *Iowa Utilities Board V. FCC*.[90] Without commenting on the holding by the Eighth Circuit with respect to the judicial estoppel found by that Court, none of the statements relied upon by NextWave, nor the circumstances in which they were made, are analogous to the statements made to the United States Supreme Court concerning the proxy prices at issue in that case. As explained at length in this order, the Government's consistent position in this litigation has been that FCC license conditions should apply despite NextWave's bankruptcy filing.

---

[89] *See In re Ludlow Hosp. Soc.*, 124 F.3d 22, 26 (1st Cir. 1997) (where Assistant United States Attorney gave oral assurances regarding deadline materially distinct from one-year deadline prescribed by regulation, bankruptcy trustee could not reasonably rely on those assurances as a basis for inferring blanket Government concession that bankruptcy court had equitable power to override regulatory deadlines).

[90] 2000 U.S. App. LEXIS 17234 (8th Cir. July 18, 2000).

IV. Ordering Clauses

34. Therefore, for all of the reasons stated above, IT IS ORDERED that the Petition for Reconsideration filed by NextWave IS DENIED.

35. IT IS FURTHER ORDERED that as a result of the cancellation of the licenses and the denial of NextWave's Petition for Reconsideration, the Application for Review and Settlement Request filed by Antigone Communications, Limited Partnership and PCS Devco, Inc. are DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

SEPARATE STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re Public Notice DA 00-49, Auction of C and F Block Broadband PCS Licenses, Nextwave Petition for Reconsideration, Order on Reconsideration (*rel. September 6, 2000*)

Government is at its best when it is most boring, when it follows laws and rules with a soporific routine. A government that is predictable and unshakable is a government on which people can rely in order to make long-term plans. After the long ordeal of the C Block bankruptcies, the Commission can best return to its routine by taking a step back and delaying the auction of the C Block licenses until there is greater clarity about the legal fate of these licenses. We should not endeavor to rush into a re-auction that may only exacerbate the already vast troubles suffered by all parties concerned. Thus, while I concur with today's decision regarding NextWave's petition for reconsideration, I would have supported a request to delay the re-auction until NextWave has had an opportunity to pursue a final decision from the Supreme Court regarding the interaction between the bankruptcy code and the Communications Act.

New technologies and ever-changing market circumstances create uncertainty and instability. Each of our auctions has dealt with different portions of the spectrum, has had different legal requirements, and has had different policy objectives. The differences in auctions make each unique. Honest and hard-working individuals, both inside and outside of the federal government, and particularly here at the FCC, invested their

time, efforts, and hopes into developing a new auction model to distribute PCS licenses. Some new government programs succeed beyond anyone's wildest dreams; others never fail to disappoint. Although perhaps clear in retrospect, at the time no signal of the C Block's fate was apparent.

It launched with great fanfare. At the time, the bid amounts were breathtakingly large. The auction seemed to mark an auspicious launch for new businesses, and a windfall of promised receipts for the federal government.

These hopes made the rapid collapse of the C-block licensees all the more dramatic, disappointing, and almost incomprehensible. In retrospect, the entire episode was not incomprehensible at all. Something dreadful went wrong. The culprit was not an individual inside or outside government; the culprit was installment payments. Their culpability is widely recognized; indeed, it is incomprehensible that this agency would ever use them again.

History is not forgiving. We cannot go back in time, completely correct our past mistakes, and start over without a trace. If we could, we would have redone the C-block auction long ago. Instead, the FCC and private parties have bravely faced the inescapable: the failure of the initial C-block auction.

What should a government agency and private parties do in the wake of a failure? Private parties can be expected to take whatever positions are necessary to save themselves. They can be expected to be mercurial and even desperate. They can be expected to seek to blame others for their plight.

The federal government could respond in a similar manner. The government's behavior could be mercurial and even desperate. It could seek to blame others for their plight.

The federal government, however, is at its best when it chooses a different path. Unlike a small company, the federal government is not threatened with evanescence. It has a future, long and bright, despite countless mistakes and bad situations. The federal government is at its best: when it is dull and boring, when it takes tedious rules and carries them out, when it is painfully predictable, when it is selfless in accepting blame for its mistakes, and when it is long-forbearing in understanding the behavior of private parties that are not at their best.

The story of the aftermath of the C-block auction, the role of the government and the private licensees is not a happy history or a pleasant drama. It is a tragedy with many victims and no heroes. It is a mixture of a comedy of the absurd and a comedy of errors—combined in a manner without comedy, only absurdity and errors. At times throughout this history, the behavior of the federal government has been difficult to predict.

The history recounted in the Commission's document has many twists and turns. But it is only part of the story. It does not, for example, describe the unexpected delays in the issuing of the initial licenses. Nor does it describe how the government's battle with NextWave is but one of several battles the government is having with C-block licensees over the role of the bankruptcy code. The federal government has had smashing legal victories against NextWave; the progress of the war is less clear in other skirmishes; and final victory for the federal government in the entire legal war is far from certain.[91]

What precisely is the federal government's view of the applicability of FCC's automatic termination of licenses to companies subject to the bankruptcy code's stay provisions? Perhaps one should ask Airadigm today, or 3 months ago, or 6 months ago, or 12 months ago. That company has been offering service for months with what it believed to be an FCC license, but which now, it seems, automatically cancelled in 1999.[92] Or perhaps one should ask Nextel about its negotiations with Commission staff for the possible transfer of NextWave's licenses in 1999 that, today, we reaffirm terminated in 1998. Or perhaps one could ask Judge Hardin, the Bankruptcy Judge in NextWave's case, who clearly seemed surprised to learn that the licenses had never been a part of that proceeding.

The battle between the Commission and NextWave has raged for two years. It is a sequence of precipitous decisions on both sides. NextWave has had victories in some courts; the Commission has had victories on appeal in higher courts. The outcomes have been hardly predictable; indeed, the entire saga is filled with more twists and turns and unexpected developments so as to appear more fictional than real.

---

[91] *See e.g.* In Re: Kansas Personal Communications Services, Ltd., Case No. 99-21747-11-JAR, Judgment on Decision (Bankruptcy Court, D. Kansas Aug. 16, 2000).

[92] *See* Airadigm Contingent Emergency Petition for Reinstatement or in the Alternative for Waiver (filed February 7, 2000). Does this petition form the foundation for differential treatment?

The NextWave litigation has not yet ended. The litigation for other C-block licensees rages as well. Yet the Commission seeks now to reauction certain C-block licenses as quickly as possible. Which licenses will be offered for auction? That depends on the status of litigation at the time of the auction. Certainly, no one today could say with certainty exactly which licenses will be available in 3 months, or 6 months, or 9 months. The Commission could hold an auction with licenses available as of a given date; but the following day, based on either Commission or court action, some of those licenses may no longer be available for auction. An auction in which the legal status of licenses is still in doubt is a risky and unpredictable adventure. Some may say that the legal status is firmly and finally established in the current matter; given the dramatic history of the C-Block, I am yet to be convinced that we have read the final chapter. There is one outcome that could be far worse than the current tragedy: if the Commission held a premature auction that a court subsequently held invalid. In that situation, the number and classes of victims would only expand; the tortuous litigation of two years would be prolonged much longer.

Independent of the merits of NextWave's litigation, I believe that it would make sense for the FCC to hold a C-Block reauction only when we have greater clarity about which licenses are available. It would result in a simple, perhaps tedious auction, one without the drama and unpredictability of the past two years. But it would be government at its best. It would be a government that sees a long future and sees its measure of success in the long term, not next week or next month. It would be a government that is patient, long-forbearing,

willing to admit its faults, willing to stand by its decisions. If that were our path, we could be predictable, unshakable, and boring in our routine. And we would all be the better for it.

APPENDIX C

[Seal omitted]

Public Notice

Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

News Media Information:
(202) 418-0500
Fax-On-Demand: (202) 418-2830
Internet: http://www.fcc.gov
ftp. fcc. gov

DA 00-49
January 12, 2000

AUCTION OF C AND F BLOCK BROADBAND PCS LICENSES

Notice of Auction Scheduled for July 26, 2000

By this Public Notice, the Wireless Telecommunications Bureau ("Bureau") announces an auction of C and F block broadband Personal Communications Services ("PCS") licenses to begin on July 26, 2000. The auction will include licenses for operation on frequencies as to which previous licenses have cancelled or otherwise have been returned to the Commission. A preliminary list of licenses available for auction is included at Attachment A. Additional licenses may be added to this inventory by public notice.

For clarification, licenses for operation on frequencies as to which previous licenses have cancelled, identified in Attachment A, are available for auction under the automatic cancellation provisions of 47 C.F.R. § 1.2110(f)(4)(iii)-(iv). The previous licensees were

participating in the Commission's installment payment plan and were more than 90 days delinquent for the July 31, 1998 resumption payment. *See also* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd. 8345 (1998); Amendment of Part 1 of the Commission's Rules —Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd. 374 (1997), *errata*, 13 FCC Rcd. 4621 (WTB 1998) and 13 FCC Rcd. 10274 (WTB 1998).

Future public notices will seek comment on specific terms and conditions for this auction, include a schedule of pre-auction events and deadlines, and may include due diligence information concerning proceedings and other matters related to previously issued licenses for this spectrum.

Media Contact: Meribeth McCarrick at (202) 418-0654.

Wireless Telecommunications Bureau: Mark Bollinger, Deputy Division Chief, Auctions and Industry Analysis Division at (202) 418-0660.

Attachment A

Preliminary List of C and F Block PCS Licenses

Lic. #	MTA	MTA Name	BTA/ Market	BTA/ Market Name	Population*	MHz
PBB004C	41	Oklahoma City	4	Ada, OK	52,677	30
PBB007C	1	New York	7	Albany, NY	1,028,615	30
PBB008C1	39	El Paso-Albuquerque	8	Albuquerque, NM	688,612	15
PBB010C	1	New York	10	Allentown, PA	686,688	30
PBB020C	6	Charlotte-Greensboro-Greenville-Raleigh	20	Asheville, NC	510,055	30
CWB024F	11	Atlanta	24	Atlanta, GA	3,197,171	10
CWB025F	9	Philadelphia	25	Atlantic City, NJ	319,416	10
PBB027C	7	Dallas-Ft. Worth	27	Austin, TX	899,361	30
PBB029C	10	Washington-Baltimore	29	Baltimore, MD	2,430,563	30
PBB036C	24	Seattle (Excluding Alaska)	36	Bellingham, WA	127,780	30
PBB043C2	1	New York	43	Binghamton, NY	356,645	15
PBB045C	12	Minneapolis	45	Bismark, ND	123,682	30
PBB047C	31	Indianapolis	47	Bloomington, IN	217,914	30
CWB050F	36	Salt Lake City	50	Boise, ID	416,503	10
PBB051C	8	Boston-Providence	51	Boston, MA	4,133,895	30
PBB055C2	24	Seattle	55	Bremerton, WA	189,731	15
PBB056C	33	San Antonio	56	Brownsville, TX	277,825	30
PBB059C	14	Houston	59	Bryan, TX	150,998	30
PBB063C2	1	New York	63	Burlington, VT	369,128	15
PBB064C	42	Spokane	64	Butte, MT	65,252	30
PBB067C	19	St. Louis	67	Carbondale, IL	209,497	30
PBB074C	6	Charlotte-Greensboro-Greenville-Raleigh	74	Charlotte, NC	1,671,037	30
PBB077C	22	Denver	77	Cheyenne, WY	103,939	30
CWB078F	3	Chicago	78	Chicago, IL	8,182,076	10
PBB081C	18	Cincinnati-Dayton	81	Cincinnati, OH	1,990,451	30
PBB084C	16	Cleveland	84	Cleveland, OH	2,894,133	30
CWB091F	6	Charlotte-Greensboro-Greenville-Raleigh	91	Columbia, SC	568,754	10
PBB093C	31	Indianapolis	93	Columbus, IN	139,128	30
PBB095C	38	Columbus	95	Columbus, OH	1,477,891	30
CWB099F	33	San Antonio	99	Corpus Christi, TX	499,988	10
CWB101F	7	Dallas-Ft. Worth	101	Dallas, TX	4,329,924	10
PBB106C	18	Cincinnati-Dayton	106	Dayton, OH	1,207,689	30
CWB107F	13	Tampa-St. Petersburg-Orlando	107	Daytona Beach, FL	399,413	10
PBB110C	22	Denver	110	Denver, CO	2,073,952	30
CWB116F	9	Philadelphia	116	Dover, DE	251,257	10
PBB117C2	21	Pittsburgh	117	Du Bois, PA	124,180	15
PBB128C	39	El Paso-Albuquerque	128	El Paso, TX	649,860	30
PBB127C2	1	New York	127	Elmira, NY	315,038	15
PBB130C	41	Oklahoma City	130	Enid, OK	85,998	30
PBB135C	26	Louisville-Lexington-Evansville	135	Evansville, IN	504,859	30
PBB136C	49	Alaska	136	Fairbanks, AK	92,111	30
PBB159C	37	Jacksonville	159	Gainesville, FL	260,538	30
PBB172C	22	Denver	172	Greeley, CO	131,821	30
PBB174C	6	Charlotte-Greensboro-Greenville-Raleigh	174	Greensboro, NC	1,241,349	30
CWB177F	6	Charlotte-Greensboro-Greenville-Raleigh	177	Greenville, SC	788,212	10
PBB179C	10	Washington-Baltimore	179	Hagerstown, MD	327,693	30
CWB181F	9	Philadelphia	181	Harrisburg, PA	654,808	10

Attachment A

Preliminary List of C and F Block PCS Licenses

Lic. #	MTA	MTA Name	BTA/ Market	BTA/ Market Name	Population*	MHz
PBB188C	42	Spokane	188	Helena, MT	58,752	30
PBB189C	6	Charlotte-Greensboro-Greenville-Raleigh	189	Hickory, NC	292,409	30
CWB190F	47	Honolulu	190	Hilo, HI	120,317	10
CWB192F	47	Honolulu	192	Honolulu, HI	836,231	10
PBB196C	14	Houston	196	Houston, TX	4,054,253	30
PBB203C2	21	Pittsburgh	203	Indiana, PA	89,994	15
PBB204C	31	Indianapolis	204	Indianapolis, IN	1,321,911	30
PBB212C	37	Jacksonville	212	Jacksonville, FL	1,114,847	30
PBB215C	35	Buffalo	215	Jamestown, NY	186,945	30
CWB216F	20	Milwaukee	216	Janesville, WI	214,510	10
PBB218C	21	Pittsburgh	218	Johnstown, PA	241,247	30
PBB220C	34	Kansas City	220	Joplin, MO	215,095	30
PBB221C	49	Alaska	221	Juneau, AK	68,989	30
CWB222F	47	Honolulu	222	Kahului, HI	100,504	10
PBB224C	42	Spokane	224	Kalispell, MT	59,218	30
CWB225F	3	Chicago	225	Kankakee, IL	127,042	10
PBB226C	34	Kansas City	226	Kansas City, MO	1,839,569	30
PBB227C	8	Boston	227	Keene, NH	111,709	30
PBB235C	31	Indianapolis	235	Lafayette, IN	247,523	30
PBB239C	13	Tampa-St. Petersburg-Orlando	239	Lakeland, FL	405,382	30
CWB240F	9	Philadelphia	240	Lancaster, PA	422,822	10
PBB241C	5	Detroit	241	Lansing, Mi	489,698	30
PBB244C	39	El Paso-Albuquerque	244	Las Crucues, NM	197,166	30
CWB245F	2	Los Angeles-San Diego	245	Las Vegas, NV	857,856	10
CWB250F	42	Spokane-Billings	250	Lewiston, ID	110,028	10
PBB251C2	8	Boston	251	Lewiston, ME	221,697	15
PBB252C	26	Louisville-Lexington-Evansville	252	Lexington, KY	816,101	30
CWB254F	47	Honolulu	254	Lihue, HI	51,177	10
PBB259C	18	Cincinnati	259	Logan, WV	43,032	30
CWB261F	30	Portland	261	Longview, WA	85,446	10
PBB261C	30	Portland	261	Longview, WA	85,446	30
PBB262C	2	Los Angeles-San Diego	262	Los Angeles, CA	14,549,810	30
PBB263C	26	Louisville-Lexington-Evansville	263	Louisville, KY	1,352,955	30
PBB265C	14	Houston	265	Lufkin, TX	144,081	30
PBB274C	8	Boston-Providence	274	Manchester, NH	540,704	30
PBB281C	38	Columbus	281	Marion, OH	92,023	30
PBB268C	33	San Antonio	268	McAllen, TX	424,063	30
PBB287C2	16	Cleveland	287	Meadville, PA	86,169	15
CWB288F	30	Portland	288	Medford, OR	209,038	10
PBB289C	13	Tampa-St. Petersburg-Orlando	289	Melbourne, FL	398,978	30
PBB295C2	44	Knoxville	295	Middlesboro, KY	121,217	15
CWB297F	20	Milwaukee	297	Milwaukee, WI	1,751,525	10
PBB298C	12	Minneapolis-St. Paul	298	Minneapolis, MN	2,840,561	30
PBB299C	12	Minneapolis	299	Minot, ND	122,687	30
PBB307C	5	Detroit	307	Mount Pleasant, Mi	118,558	30
PBB317C2	21	Pittsburgh	317	New Castle, PA	96,246	15
PBB318C	1	New York	318	New Haven, CT	978,311	30

Attachment A

Preliminary List of C and F Block PCS Licenses

Lic. #	MTA	MTA Name	BTA/ Market	BTA/ Market Name	Population*	MHz
PBB319C	1	New York	319	New London, CT	357,482	30
PBB321C	1	New York	321	New York, NY	18,050,615	30
PBB324C	23	Richmond-Norfolk	324	Norfolk, VA	1,635,296	30
CWB326F	13	Tampa-St. Petersburg-Orlando	326	Ocala, FL	194,833	10
PBB328C2	21	Pittsburgh	328	Oil City, PA	105,882	15
PBB329C	41	Oklahoma City	329	Oklahoma City, OK	1,305,472	30
PBB330C	35	Buffalo	330	Olean, NY	239,343	30
PBB331C	24	Seattle (Excluding Alaska)	331	Olympia, WA	258,937	30
PBB333C2	1	New York	333	Oneonta, NY	107,742	15
PBB336C	13	Tampa-St. Petersburg-Orlando	336	Orlando, FL	1,256,429	30
PBB339C	26	Louisville	339	Paducah, KY	217,082	30
PBB341C	7	Dallas	341	Paris, TX	89,422	30
CWB346F	9	Philadelphia	346	Philadelphia, PA	5,899,345	10
PBB350C	21	Pittsburgh	350	Pittsburgh, PA	2,507,839	30
PBB352C	1	New York	352	Plattsburgh, NY	123,121	30
PBB356C2	24	Seattle	356	Port Angeles, WA	76,610	15
PBB357C	8	Boston-Providence	357	Portland, ME	471,614	30
CWB358F	30	Portland	358	Portland, OR	1,690,930	10
PBB358C	30	Portland	358	Portland, OR	1,690,930	30
PBB359C	18	Cincinnati	359	Portsmouth, OH	93,356	30
PBB361C	1	New York	361	Poughkeepsie, NY	424,766	30
PBB363C	8	Boston	363	Presque Isle, ME	86,936	30
PBB364C	8	Boston-Providence	364	Providence, RI	1,509,789	30
CWB365F	36	Salt Lake City	365	Provo, UT	269,407	10
CWB370F	9	Philadelphia	370	Reading, PA	336,523	10
PBB374C	23	Richmond-Norfolk	374	Richmond, VA	1,090,869	30
PBB376C	23	Richmond-Norfolk	376	Roanoke, VA	609,215	30
CWB385F	30	Portland	385	Roseburg, OR	94,649	10
PBB388C2	1	New York	388	Rutland, VT	97,987	15
CWB389F	4	San Francisco-Oakland-San Jose	389	Sacramento, CA	1,656,581	10
PBB390C	5	Detroit	390	Saginaw-Bay, Mi	615,364	30
PBB398C	10	Washington	398	Salisbury, MD	163,043	30
CWB398F	10	Washington-Baltimore	398	Salisbury, MD	163,043	10
CWB399F	36	Salt Lake City	399	Salt Lake City, UT	1,308,035	10
PBB401C	33	San Antonio	401	San Antonio, TX	1,530,954	30
PBB402C	2	Los Angeles-San Diego	402	San Diego, CA	2,498,016	30
CWB404F	4	San Francisco-Oakland-San Jose	404	San Francisco, CA	6,420,984	10
PBB407C1	39	El Paso-Albuquerque	407	Santa Fe, NM	174,526	15
PBB408C	13	Tampa-St. Petersburg-Orlando	408	Sarasota, FL	513,348	30
PBB412C	1	New York	412	Scranton, PA	678,410	30
PBB413C	24	Seattle (Excluding Alaska)	413	Seattle, WA	2,708,949	30
PBB414C2	34	Kansas City	414	Sedalia, MO	79,705	15
PBB416C2	16	Cleveland	416	Sharon, PA	121,003	15
CWB425F	42	Spokane-Billings	425	Spokane, Wa	612,862	10
PBB428C	19	St. Louis	428	Springfield, MO	532,880	30
CWB394F	19	St. Louis	394	St Louis, MO	2,742,114	10
PBB431C	21	Pittsburgh	431	Steubenville, OH	142,523	30

Attachment A

Preliminary List of C and F Block PCS Licenses

Lic. #	MTA	MTA Name	BTA/ Market	BTA/ Market Name	Population*	MHz
PBB435C2	1	New York	435	Stroudsburg, PA	95,709	15
PBB440C	13	Tampa-St. Petersburg-Orlando	440	Tampa, FL	2,249,405	30
PBB441C	7	Dallas-Ft. Worth	441	Temple, TX	291,768	30
PBB447C1	27	Phoenix	447	Tucson, AZ	666,880	15
CWB448F	48	Tulsa	448	Tulsa, OK	836,559	10
CWB452F	7	Dallas-Ft. Worth	452	Tyler, TX	269,762	10
CWB460F	42	Spokane-Billings	460	Walla Walla, WA	151,563	10
PBB461C	10	Washington-Baltimore	461	Washington, DC	4,118,628	30
PBB463C2	1	New York	463	Watertown, NY	296,253	15
PBB470C	19	St. Louis	470	West Plains, MO	67,165	30
PBB480C	8	Boston-Providence	480	Worcester, MA	709,705	30
CWB482F	24	Seattle (Excluding Alaska)	482	Yakima, WA	215,548	10
CWB483F	9	Philadelphia	483	York, PA	417,848	10

Notes:

*** Population**

All population figures are from the 4/1/90 U.S. Census, U.S. Department of Commerce, Bureau of the Census.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 992, Docket 99-5063

IN RE FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

[May 25, 2000]

Before: MCLAUGHLIN, JACOBS and SACK, Circuit Judges.

JACOBS, Circuit Judge:

The Federal Communications Commission ("FCC") petitions this Court for a writ of mandamus to the United States Bankruptcy Court for the Southern District of New York (Hardin, *B.J.*). On February 7, 2000, the bankruptcy court issued an order prohibiting the FCC from re-auctioning spectrum licenses previously held by debtor NextWave Personal Communications, Inc. ("NextWave"). The FCC argues that the bankruptcy court's order violated this Court's mandate, expressed in *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999) (*NextWave* Appeal), which held that it was beyond the bankruptcy court's jurisdiction "to mandate that a licensee be allowed to keep its license despite its failure to meet the conditions to which the license is subject." *Id.* at 54.

In our *NextWave* decision, this panel (1) rejected the bankruptcy court's determination that the FCC's requirement of full payment as a condition for spectrum licensure lacked a regulatory purpose, and (2) reversed a judgment modifying that condition. On remand, the bankruptcy court has (1) determined that the FCC's requirement of timely payment as a licensing condition is without regulatory purpose, and (2) nullified an FCC decision based on an asserted violation of that condition. The FCC contends that the *timely*-payment requirement (like the *full*-payment requirement) is (1) a regulatory condition for licensure, (2) within this Court's *NextWave* mandate, and (3) in any event, outside the limited jurisdiction of the bankruptcy court.

Because we conclude that the bankruptcy court's ruling violates our prior mandate, and that the FCC's licensing decisions are subject to the exclusive jurisdiction of the federal courts of appeals and outside the limited jurisdiction of the bankruptcy court, the petition is GRANTED. We make no comment on the prospects of the (precautionary) appeals filed by NextWave in the Court of Appeals for the District of Columbia Circuit.

BACKGROUND

A. The previous appeal[1]

In summer 1996, NextWave was the high bidder at FCC auctions for 63 personal communications services ("PCS") spectrum licenses (the "Licenses"). Next-

[1] This Court's previous opinion contains a more complete recounting of relevant events that occurred prior to the December 22, 1999 issuance of that opinion. *See NextWave* Appeal, 200 F.3d at 46-50.

Wave's winning bids aggregated $4.74 billion. Because NextWave enjoyed the status of a "small business," only ten percent of the amount bid was required to be paid in cash. *See* 47 C.F.R. § 24.711(b)(3). On February 14, 1997, following some further proceedings to correct NextWave's noncompliance with statutory ownership requirements, the FCC granted the Licenses to NextWave, conditioned upon issuance of a series of promissory notes for the $4.27 billion balance of NextWave's obligations. NextWave promptly executed the notes.

By the time these notes were executed, further auctions had been conducted at which similar licenses had been auctioned at prices significantly lower than NextWave's winning bids. Alarmed that as a result it had bid beyond its capacity to obtain financing, NextWave sought relief from the FCC and the Court of Appeals for the District of Columbia Circuit. Those efforts were unsuccessful.[2] On June 8, 1999, NextWave

[2] *See NextWave Telecom Inc. v. FCC*, No. 98-1255, 1998 WL 389116 (D.C. Cir. June 11, 1998) (order denying stay pending review); *In the Matter of Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998, Personal Communications Services C Block Election Date (Order)*, 13 F.C.C.R. 1188C, 1998 WL 278735 (FCC June 1, 1998); *see also In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, (Second Report and Order and Further Notice of Proposed Rule Making)*, 12 F.C.C.R. 16436, 1997 WL 643811 (FCC Oct. 16, 1997); *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, (Order on Reconsideration of the Second Report and Order)*, 13 F.C.C.R. 8345, 1998 WL 130176 (FCC Mar. 24, 1998); *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, (Second Order on Recon-*

filed a bankruptcy petition under Chapter 11 and commenced an adversary proceeding against the FCC. *See NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 263, 267 (Bankr. S.D.N.Y. 1998) (*NextWave I*).

In the adversary proceeding, NextWave alleged that the transaction by which it was granted the Licenses was a fraudulent conveyance and therefore avoidable under § 544 of the Bankruptcy Code. *See id.* at 269 (citing 11 U.S.C. § 544). The FCC argued that the bankruptcy court lacked subject matter jurisdiction over NextWave's claim because exclusive jurisdiction to review FCC regulatory actions is lodged in the courts of appeals pursuant to 28 U.S.C. § 2342 and 47 U.S.C. § 402. The bankruptcy court rejected this argument, holding that in its effort to collect the full auction price of the Licenses, the FCC was acting solely as a creditor, and not as a regulator. *See NextWave I*, 235 B.R. at 269-71. The bankruptcy court thus concluded that subject matter jurisdiction was sound and proceeded to try NextWave's claims.

At the conclusion of trial, the bankruptcy court found that at the time the Licenses were granted, they were worth only $1.023 billion (determined by comparison to similar licenses auctioned subsequently), and that any obligation in excess of that amount was avoidable as a constructive fraud. *See NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 277, 304 (Bankr. S.D.N.Y. 1999) (*NextWave IV.A*). In effect, the avoidance remedy reduced by more than three-quarters the total

sideration of the Second Report and Order), F.C.C. 99-66, 14 F.C.C.R. 6571, 1999 WL 183822 (FCC Apr. 5, 1999).

amount NextWave had bid at auction. *See* 11 U.S.C. § 544; *NextWave IV.A*, 235 B.R. at 304; *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 305, 306-07 (Bankr. S.D.N.Y. 1999) (*NextWave IV.B*).

The FCC appealed the bankruptcy court's judgment to the United States District Court for the Southern District of New York (Brieant, *J.*), which affirmed for reasons substantially the same as those stated by the bankruptcy court. *See NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311, 315-16, 319-21 (S.D.N.Y. 1999).[3]

The FCC appealed to this Court. On November 24, 1999, we issued an order (with opinion to follow) reversing the ruling that NextWave's obligation to the FCC was a fraudulent conveyance, and we remanded the

[3] The district court affirmed five decisions of the bankruptcy court: *In re NextWave Personal Communications, Inc.*, 235 B.R. 314 (Bankr. S.D.N.Y. 1999) (June 16, 1999 decision denying the motion to lift the automatic stay) (*NextWave V*); *NextWave IV.A*, 235 B.R. 277 (May 12, 1999 decision on the fraudulent conveyance claim), *supplemented by NextWave IV.B*, 235 B.R. 305 (June 22, 1999 decision on remedy); *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, No. 98-21529 (Bankr. S.D.N.Y. Apr. 2, 1999) (oral denial of the FCC's motion to dismiss) (*NextWave III*); *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 272 (Bankr. S.D.N.Y. 1999) (Feb. 16, 1999 decision denying to the FCC and granting to the debtor partial summary judgment with regard to the date upon which the obligations were incurred) (*NextWave II*); and *NextWave I*, 235 B.R. 263 (Dec. 7, 1998 decision granting in part and denying in part the FCC's motion to dismiss).

case to the bankruptcy court for further proceedings. *See NextWave* Appeal, 200 F.3d at 45-46, 62.

Our opinion issued on December 22, 1999. We explained that spectrum licenses (of which PCS licenses form a subset) are distributed by auction because "a method was needed that would direct licenses toward those entities and technologies that would put them to the best use," and because "Congress came to the conclusion that using market forces to allocate spectrum" would best achieve such a distribution. *Id.* at 51. In authorizing the FCC to develop a system of spectrum auctions, Congress had regulatory objectives, and was not chiefly interested in maximizing license-holders' contributions to the fisc:

> [T]he broader purpose of [47 U.S.C. § 309(j), the statutory provision authorizing spectrum auctions,] was to create *an efficient regulatory regime* based on the congressional determination that competitive bidding is the most effective way of allocating resources to their most productive uses. The FCC was not asked to sell off the spectrum (something it did not own) in an effort to raise as much money as possible; it was not asked to develop a free-market system to maximize revenue. Instead, it was told to auction licenses to the highest bidder because such a system was thought likely to promote the development of new technologies and encourage efficient use of the spectrum, while simultaneously recouping some of the value of the spectrum for the public.

NextWave Appeal, 200 F.3d at 52 (emphasis added; footnote omitted).

Congress mandated that spectrum licenses be distributed by auction because auction "bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue." *Id.* at 59. The auction-based scheme "reflect[s] a classical belief in the efficacy of market forces," the "fundamental rationale" of which is that "[t]hose qualified bidders" most likely to make efficient, technologically dynamic use of the spectrum are, on average, those to whom the spectrum licenses are most valuable, and therefore are "those who should be awarded the licenses." *Id.* at 52-53. Thus the spectrum auctions are "a *regulatory tool* for ensuring that licenses are distributed in the way that fulfils the goals of the [Federal Communications Act ('FCA')]." *Id.* at 53 (emphasis added).

Having determined that the purpose of spectrum auctions was chiefly regulatory, not fiscal, we then turned to the FCC's exclusive jurisdiction over regulation of the spectrum. Noting that the FCC's exclusive jurisdiction over licensing matters extended to the conditions placed on licenses, we held that "[w]hen the FCC decides which entities are entitled to spectrum licenses under rules and conditions it has promulgated," it is exercising a quintessentially regulatory power. *Id.* at 54. We recognized that pursuant to 28 U.S.C. § 2342 and 47 U.S.C. § 402, review of the FCC's regulatory decisions and orders is entrusted solely to the federal courts of appeals and is therefore outside the jurisdiction of the bankruptcy and district courts. *See id.*

Finally, we examined the bankruptcy court's decisions to determine whether they intruded upon the FCC's exclusive jurisdiction over spectrum licensing and the courts of appeals' exclusive jurisdiction to

review the FCC's licensing decisions. We determined that the full payment of winning bids was a regulatory condition for the retention of licenses by successful bidders:

> NextWave's inability to follow through on its financial undertakings had more than financial implications. It indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the Licenses efficiently for the benefit of the public in whose interest they were granted. It meant, *in regulatory terms*, that NextWave was not entitled to the Licenses.

Id. (emphasis added). Because "[t]he FCC's auction rules . . . have primarily a regulatory purpose," we held that the approach taken by the bankruptcy and district courts—which allowed NextWave to keep PCS licenses under conditions that the FCC considered non-compliant—was "fundamentally mistaken." *Id.*

We thus held that even where the regulatory conditions imposed on a license take the form of a financial obligation, the bankruptcy and district courts lack jurisdiction to interfere in the FCC's allocation. Therefore, "even if the bankruptcy and district courts were right in concluding that granting the Licenses at a small fraction of NextWave's original successful bid price best effectuated the FCA's goals, they were *utterly without the power* to order that NextWave be allowed to retain them for that reason or on that basis." *Id.* at 55 (emphasis added; internal citations omitted).

B. Subsequent events

On December 16, 1999—after this Court held that the FCC's licensing requirements were not subject to alteration in the bankruptcy court—NextWave filed modifications to its proposed plan of reorganization. Until then, NextWave had been contending that payment of the $4.27 billion still owed was beyond its capacity and that the incurring of the debt was a constructive fraud. But under its proposed modifications to the plan, NextWave would pay in full its overdue obligation to the FCC and undertake to pay the notes as they come due.[4] See *In re NextWave Personal Communications Inc.*, 244 B.R. 253, 262 (Bankr. S.D.N.Y. 2000) ("*NextWave VI*").

On January 11, 2000, NextWave sweetened its offer to the FCC and proposed to pay in a single lump sum the present value of its billions of dollars in notes. The lump-sum payment proposal was new and not part of NextWave's proffered modifications.

The day after NextWave's lump-sum offer, on January 12, 2000, the FCC issued a Public Notice of an "Auction of C and F Block Broadband PCS Licenses" (the "Public Notice"), in which the FCC announced the re-auction of the Licenses then held by NextWave. The

---

[4] The bankruptcy court characterizes the modifications proposed on December 16 as an offer made "regardless of the outcome of the appeal in the Circuit Court." *In re NextWave Personal Communications Inc.*, 244 B.R. 253, 262 (Bankr. S.D.N.Y. 2000). The order reversing the judgment below was issued on November 24, however, so the outcome of the FCC's appeal was known at the time of the proposed modifications. *See NextWave* Appeal, 200 F.3d at 45-46.

Public Notice made no mention of the previous licensee, but the FCC's memorandum objecting to the modified reorganization plan explains that the cancellation of the Licenses was occasioned by NextWave's default under the terms of the Licenses. According to the FCC, that default resulted in the "automatic[ ] cancel[lation]" of the Licenses. *See id.*

In particular, NextWave had failed to make timely payments on the Licenses, as the licensing agreements obligated it to do. The FCC maintains that such a failure results in automatic license cancellation:

> In light of the Second Circuit's ruling, it is clear that the Debtors' C and F block PCS licenses automatically canceled pursuant to the terms and conditions upon which they were granted. Given that a licensee's failure to comply with a license's full and timely payment condition automatically results in the termination of a spectrum authorization, requiring no affirmative steps by the FCC, *see* 47 C.F.R. § 1.2110, . . . the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362, are not implicated by the cancellation of the Debtors' C and F block PCS licenses. . . . Accordingly, the Debtors are divested of their C and F block PCS spectrum rights. . . .

Objection of Federal Communications Commission to Debtors' Modified First Amended Joint Plan of Reorganization, *In re NextWave Personal Communications, Inc.*, No. 98 B 21529(ASH), at 3-4 (Bankr. S.D.N.Y. Jan. 12, 2000) (FCC Objection). According to the Public Notice, the auctions are scheduled for July 26, 2000.

NextWave moved by order to show cause for an order declaring the Public Notice null and void. *See NextWave VI*, 244 B.R. at 257. The bankruptcy court granted NextWave's motion on January 31, 2000, stating the following three reasons:

> (1) Because the Licenses constituted "property of the estate," their revocation (via the Public Notice) violated the automatic stay of the Bankruptcy Code. *See NextWave VI*, 244 B.R. at 266-68 (citing 11 U.S.C. § 362(a)(1), (3)-(6)).
>
> (2) Because the cure provisions of the Bankruptcy Code, 11 U.S.C. §§ 1123(a)(5)(G) and 1124(2)(A), allow NextWave to cure any default—*i.e.*, they allow NextWave to "revers[e]" the event that triggers default—the FCC cannot rely on any default as a premise for revoking the Licenses. *Id.* at 268-69 (citing *Di Pierro v. Taddeo (In re Taddeo)*, 685 F.2d 24, 26-27 (2d Cir. 1982)).

The bankruptcy court further held that the default cited by the FCC was in fact no default, regardless of the opportunity to cure, because NextWave was barred from making payments absent an order of the bankruptcy court, given subsequent to a hearing: "[T]he debtors had neither the authority nor the ability to make [those] payments absent notice and court approval." *NextWave VI*, 244 B.R. at 274-76; *see also* 11 U.S.C. §§ 102(1), 363. According to the bankruptcy court, NextWave's non-payment was compelled by the automatic stay and therefore cannot be an event of default: "Any notion of a legally cognizable 'default' presupposes that the debtors could have lawfully made post-petition payments to the FCC in the first

instance." *Id.* at 274. The bankruptcy court therefore considered it "senseless to speak of a 'default'" in this case. *Id.* at 276.

(3) Under the doctrines of waiver and equitable estoppel, the FCC is now barred from revoking the Licenses because it failed earlier to contend that the Licenses were forfeit. *See id.* at 276-81.

By order dated February 7, 2000, the bankruptcy court granted NextWave's motion for an order enforcing the automatic stay and decreed that the FCC's Public Notice was "null, void, and without force or effect." *In re NextWave Personal Communications Inc.*, No. 98 B 21529(ASH) (Bankr. S.D.N.Y. Feb. 7, 2000) (order enforcing the automatic stay with respect to the Licenses).

The FCC promptly petitioned this Court for a writ of mandamus on the ground that the bankruptcy court's ruling obstructs our mandate.

DISCUSSION

This Court has the authority to grant writs of mandamus under Rule 21(a) of the Federal Rules of Appellate Procedure; but the standard for issuance is stringent, and such writs are rarely issued. Mandamus is not used simply to correct error. *See Will v. United States*, 389 U.S. 90, 98 n.6, 88 S. Ct. 269, 275 n.6, 19 L.Ed.2d 305 (1967); *In re Steinhardt Partners, L.P. (Salomon Bros. Treasury Litig. v. Steinhardt Partners, L.P.)*, 9 F.3d 230, 233-34 (2d Cir. 1993). It is reserved for "judicial usurpation[s] of power" by inferior courts. *Will*, 389 U.S. at 95, 88 S. Ct. at 273 (citation and internal quotation marks omitted); *accord Mallard v. United*

States Dist. Court, 490 U.S. 296, 309, 109 S. Ct. 1814, 1822, 104 L.Ed.2d 318 (1989). Mandamus is properly granted for two purposes:

(1) Protection of a superior court's mandate, *see General Atomic Co. v. Felter*, 436 U.S. 493, 497, 98 S. Ct. 1939, 1941, 56 L.Ed.2d 480 (1978), to assure that "the terms of the mandate [are] scrupulously and fully carried out," and that the inferior court's "actions on remand [are] not . . . inconsistent with either the express terms or the spirit of the mandate," *In re Ivan F. Boesky Sec. Litig. (Kidder, Peabody & Co. v. Maxus Energy Corp.)*, 957 F.2d 65, 69 (2d Cir. 1992) (citation and internal quotation marks omitted); or

(2) Restraining an inferior court from detours into areas in which it lacks jurisdiction (or, in some instances, forcing an inferior court to take an obligatory action), *see Ex parte Republic of Peru*, 318 U.S. 578, 583, 63 S. Ct. 793, 796-97, 87 L.Ed. 1014 (1943).

Generally, mandamus is appropriate only where no other remedy adequately protects the petitioner's interest. *See In re von Bulow (von Bulow ex rel. Auersperg v. von Bulow)*, 828 F.2d 94, 98 (2d Cir. 1987). Such a situation exists where the time required for the ordinary appeals process would deprive the petitioner of the right it claims (here, to re-auction the Licenses on the announced date, July 26, 2000). *See In re King World Productions*, 898 F.2d 56, 58-59 (6th Cir. 1990) (listing among the factors to be considered when determining the propriety of mandamus whether "[t]he petitioner will be damaged or prejudiced in a way not correctable on appeal," as well as whether "[t]he dis-

trict court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules"); *cf. In re Cooper*, 971 F.2d 640, 641 (11th Cir. 1992) (holding an alternative remedy to be inadequate where it would have caused great delay in the vindication of the petitioners' rights). This Court will grant a mandamus petition only where the petitioner's right to relief is "clear and indisputable." *In re International Bus. Machs. Corp.*, 45 F.3d 641, 643 (2d Cir. 1995) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 18, 103 S. Ct. 927, 938, 74 L.Ed.2d 765 (1983)) (internal quotation marks omitted).

The questions presented by this petition are whether the bankruptcy court's decision amounted to review of the FCC's "regulatory" actions, as we used that term in our opinion of December 22, 1999, *see, e.g., NextWave* Appeal, 200 F.3d at 54; if so, whether that court's actions derogated from "either the express terms or the spirit of the mandate," *In re Boesky*, 957 F.2d at 69; and whether (even absent that mandate) the bankruptcy court exceeded its statutory jurisdiction by engaging in such review. We conclude that the bankruptcy court's decision: (1) amounted to the review of an order or decision of the FCC, for which the bankruptcy court lacks jurisdiction, and (2) contravened this Court's mandate. We therefore grant the petition.

A. The bankruptcy court's decision

The FCC argues that the requirement of timely payment, like the requirement of payment in full, is driven by regulatory considerations. The Commission further argues that the regulatory nature of the disputed requirement is manifest in this Court's opinion of December 22, 1999.

In the previous appeal, the district court had held that the FCC's claim to full payment "ha[d] nothing to do with the FCC's organization, execution, or implementation of the radio spectrum auction. Neither did the claim implicate the FCC's power to regulate the issuance or use of spectrum licenses." *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311, 315 (S.D.N.Y. 1999) (internal quotation marks omitted). We held that such an approach "was fundamentally mistaken." *NextWave* Appeal, 200 F.3d at 54. Recognizing that "NextWave's inability to follow through on its financial undertakings had more than financial implications," we held that the FCC's decision as to "which entities are entitled to spectrum licenses under rules and conditions it has promulgated" is a paradigmatic instance of the FCC's exclusive regulatory power over licensing. *Id.*

The FCC's Public Notice of re-auction presented the bankruptcy court with a variation on the same question: whether it could undo the consequences of NextWave's failure to fulfill the timely-payment requirement under the Licenses, as determined by the FCC. The bankruptcy court properly characterized the issue as whether timely payment was a regulatory condition for licensure, and it then held that this Court's previous mandate does not control that question, *see NextWave VI*, 244 B.R. at 283, that is, that while *full* payment is a regulatory condition, *timely* payment is not. The

bankruptcy court's reasoning on this issue is set forth in the margin.[5]

---

[5] Judge Hardin rejected, as follows, the FCC's contention that this Court's mandate controlled the issue of whether timely payment was a regulatory condition:

> Little need be said of the FCC's contention that the instant motion is governed by the Second Circuit Decision. Ultimately, it will be for the Court of Appeals to resolve this controversy, if the parties do not sooner settle it among themselves. In the meantime, the matter has been remanded to the Bankruptcy Court, and it is the responsibility of this Court to address the issues raised by this motion for review by the District and Circuit Courts.
>
> The Court of Appeals rulings in respect of *NextWave I*, concerning subject matter jurisdiction, and *NextWave II*, concerning fraudulent conveyance analysis, are the law of the case in these proceedings. But they do not touch upon the issues now before this Court, which arise from a subsequent event, the January 12 Declaration. Indeed, in remanding to the Bankruptcy Court, the Court of Appeals specifically referred to the possibility that the FCC might, in the future, seek to revoke the Licenses.
>
> The FCC relies upon the statement in the Circuit Court Decision that "the FCC made 'full and timely payment of the winning bid' a regulatory condition for obtaining and retaining spectrum license" (200 F.3d at 52). However, the very next sentence states: "This 'payment in full' requirement has a regulatory purpose . . ." (*id.*), and the entire balance of the Circuit Court Decision bearing on the question of regulatory purpose and subject matter jurisdiction is concerned solely with the "payment in full" requirement, which was the only matter before the Court. The Court of Appeals did not consider the question whether the "timely payment" requirement was invested with a regulatory purpose, because the FCC had never asserted any legal position based upon NextWave's failure to make post-petition payments on its pre-petition claims.

NextWave VI, 244 B.R. at 283 (internal citation omitted).

Recognizing that it lacked power to review FCC regulatory actions, the bankruptcy court sought to cast the dispute in non-regulatory terms. Thus the court concluded that the FCC's declaration of a default (1) "lack[ed] any comprehensible regulatory objective," *id.* at 270, and (2) was therefore simply the action of an ordinary creditor:

> The Court of Appeals has held that there is a "regulatory" aspect in the FCC's "payment in full" requirement. But no such aspect can be inferred with respect to the FCC's "timely payment" requirement. No rational explanation has been offered to show that timeliness has any objective other than pure debtor-creditor economics.

Id. at 281.

This statement is at odds with our previous opinion. We expressly deferred to the FCC's "expert judgment as to the course that would best promote congressional objectives and serve the public interest," *NextWave* Appeal, 200 F.3d at 53; and we ultimately held that "[w]hen the FCC decides which entities are entitled to spectrum licenses under rules and conditions it has promulgated, it therefore exercises *the full extent of its regulatory capacity.*" *Id.* at 54 (emphasis added). The bankruptcy court finds that "[n]o rational explanation has been offered to show that timeliness has any objective other than pure debtor-creditor economics." *NextWave VI*, 244 B.R. at 281. This misses the point.

The FCC need not defend its regulatory calculus *in the bankruptcy court;* whenever an FCC decision implicates its exclusive power to dictate the terms and conditions of licensure, the decision is regulatory. And if the decision is regulatory, it may not be altered or impeded by any court lacking jurisdiction to review it.

The FCC's decision to re-auction the Licenses previously granted to NextWave is one that implicates the conditions of licensure, in itself a circumstance sufficient to require the bankruptcy court's deference. Moreover, the regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time. Given this evident analogy, our analysis of the full-payment obligation (in our previous opinion) should have alerted the bankruptcy court that the FCC's determination as to prompt payment was by nature regulatory. Time of payment and amount of payment are alike functions of value. *Cf. Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. # 1 (In re Thinking Machs. Corp.)*, 67 F.3d 1021, 1022 (1st Cir. 1995) ("Time is money. . . ."). There can be little doubt that if full payment is a regulatory condition, so too is timeliness. *See NextWave* Appeal, 200 F.3d at 59-60 (detailing the regulatory purpose behind the FCC's general insistence on payment according to the terms set at auction, so that the "bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue"); *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 522 (D.C. Cir. 1999) ("[T]he Commission . . . gave fair notice of the importance it attaches to meeting payment dates. . . ."); FCC Objection at 2-4. "The Commission has

long noted the importance it attaches to timely payment." *Mountain Solutions*, 197 F.3d at 519 (citing *In re Implementation of Section 309(j) of the Communications Act, (Second Report and Order)*, 9 F.C.C.R. 2348, ¶ 197, 1994 WL 412167 (FCC April 20, 1994)).

We therefore conclude that the FCC's decision was in fact regulatory. This conclusion is reinforced by the bankruptcy court's own statement of reasons. In the course of deciding that the FCC's re-auction decision lacked any regulatory purpose, the bankruptcy court was in effect and in fact questioning the FCC's regulatory judgments:

> What regulatory principle or public interest does the FCC invoke to outweigh the investment in these debtors of over $1 billion in debt and equity? What public policy is served by an act of the United States Government which violates basic notions of equity, due process and the Bankruptcy Code? What purpose is served by the FCC's relinquishment of over $4.7 billion for the C Licenses? How does the [Public Notice] coexist with 47 U.S.C. § 309(j)(3)(A) looking to "rapid deployment" of spectrum "without administrative or judicial delays," or 47 U.S.C. § 309(j)(7)(A) and (B) prohibiting the FCC from exercising its regulatory discretion "on the expectation of Federal revenues["?]

NextWave VI, 244 B.R. at 282-83. Whatever the force of these rhetorical questions, the answers entail regulatory decisions and are outside the jurisdiction of the bankruptcy court.[6]

---

[6] *See also, e.g., NextWave VI*, 244 B.R. at 263 (in rejecting the FCC's finding of a default, reasoning that "[t]he existence of a

In considering another of NextWave's arguments, the bankruptcy court explicitly questioned the rationale behind the FCC's decision to re-auction the Licenses:

> Finally, one of the important statutory objectives of FCA § 309(j), rapid deployment and utilization of C and F block spectrum by designated entities, would be undermined by cancellation and reauction of the Licenses. Judging by the C, D, E and F block auctions, it is highly unlikely that licenses auctioned beginning on July 26, 2000 would result in final grant of the Licenses to the high bidders before winter or spring 2001, at which time the designated entity licensees would have to raise the necessary funding to begin building out their PCS systems. NextWave is a designated entity. It was awarded the Licenses in January 1997. It represents that it has already developed the necessary infrastructure to a considerable degree. It is prepared to put the Licenses into use almost immediately. And all this must be considered in light of the fact that PCS and wireless telephone is developing at lightning speed,

---

default here depends upon an interpretation of the FCC's regulations"); *id.* ("Transcendent considerations of fairness and due process, as expressed in the very statute that governs the FCC, compel the conclusion that the FCC cannot summarily eviscerate the debtors' estate on the basis of a purported 'regulatory default.'"); *id.* at 264 ("The FCC argued that, despite the language 'will be declared in default,' it was incumbent on the debtors, before a 'default' occurred, to seek an extension or waiver before any discretion of the FCC could be invoked. The history of this regulation indicates otherwise."); *id.* at 281 n. 26 ("[O]ne must wonder what was the impact on [the FCC's regulatory] objective of . . . the FCC's numerous regulations, orders, notices and instructions rescheduling and repeatedly changing payment deadlines. . . .").

> such that another year's delay is of great significance.

Id. at 271.

Although the bankruptcy court's opinion is stated in terms of whether timely payment is a regulatory condition, the question posed and answered is whether the regulatory condition of timely payment is arbitrary. Elsewhere, the bankruptcy court flatly rejects the idea that the FCC can have anything to say about communications licenses in the hands of debtors: "[O]ne must ask whether there is *any* regulatory concern of such consequence that it should override the protections and policy considerations that lie at the very core of the Bankruptcy Code, or bar jurisdiction of the Bankruptcy Court from enforcing the Code." *Id.* at 282 (emphasis added).

In short, the FCC made timely payment a regulatory condition; and the bankruptcy court has concluded that such a condition is arbitrary, in the sense that it serves no regulatory purpose that the bankruptcy court is prepared to recognize. However, a regulatory condition is a regulatory condition even if it is arbitrary. It is for the FCC to state its conditions of licensure, and for a court with power to review the FCC's decisions to say if they are arbitrary or valid.

B. Mandamus

Our extraordinary mandamus power has two purposes: to achieve compliance with the terms and spirit of our mandates, and to constrain inferior courts to proper exercises of their jurisdiction. In this case, the two uses of mandamus overlap and reinforce one another. This Court's previous opinion reversed a decision of the bankruptcy court on the ground that that court lacked jurisdiction. The bankruptcy court again seeks to control the FCC's allocation of licenses, notwithstanding this Court's express holding that "the bankruptcy and district courts lack[ ] jurisdiction to decide the question of whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses." *NextWave* Appeal, 200 F.3d at 54. Thus a writ of mandamus protecting this Court's mandate also confines the inferior court to the lawful exercise of its jurisdiction.

1. The mandate

Our prior opinion clearly and repeatedly emphasizes that the bankruptcy court is without power to review the FCC's regulatory actions:

> If the conditions to which a license is subject are not met, the FCC may revoke the license. It is beyond the jurisdiction of a court in a collateral proceeding to mandate that a licensee by allowed to keep its license despite its failure to meet the conditions to which the license is subject.
>
> *When the FCC decides which entities are entitled to spectrum licenses under rules and conditions it has promulgated, it therefore exercises the full*

> *extent of its regulatory capacity.* Because jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals, *see* 28 U.S.C. § 2342; 47 U.S.C. § 402, *the bankruptcy and district courts lacked jurisdiction to decide the question of whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses.*

Id. (emphasis added).

In supporting this jurisdictional holding, this Court discussed the "spheres of authority" within which agencies and courts operate:

> For over fifty years the Supreme Court has recognized that under the FCA the division of authority between these "spheres" requires that "no court can grant an applicant an authorization which the Commission has refused." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14, 62 S. Ct. 875, 86 L.Ed. 1229 (1942). Under the FCA, it is the FCC and not the courts that "must be satisfied that the public interest will be served by . . . the license." *FCC v. WOKO, Inc.*, 329 U.S. 223, 229, 67 S. Ct. 213, 91 L.Ed. 204 (1946).

Id.

Our mandate required the bankruptcy court to refrain from impeding the regulatory actions of the FCC, in particular, the FCC's enforcement of the payment schedule established by its regulations, orders, and decisions. The bankruptcy court founds its jurisdiction for doing so chiefly on the automatic stay provision of 11 U.S.C. § 362 and on that court's power under

the provision to decide what acts are prevented. The bankruptcy court declared the Public Notice to be null and void because:

> The [Public Notice] implicates subsections (1) and (6) and it unarguably violated subsections (3), (4) and (5) [of 11 U.S.C. § 362(a)]. Accordingly, the [Public Notice] was void.

NextWave VI, 244 B.R. at 267-68. The extensive briefing on this petition for mandamus is largely directed to this question.

The automatic stay has its limits. Here, the applicable limit is set forth in 11 U.S.C. § 362(b)(4), which provides an exception under paragraphs (1), (2), (3) and (6)[7] for:

> the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

11 U.S.C. § 362(b)(4) (West Supp. 1999). Undoubtedly, the FCC is a governmental unit that is seeking "to enforce" its "regulatory power." Nevertheless, the bankruptcy court decided that "[§] 362(b)(4) is not applicable here. The FCC's action is nothing other than a direct

[7] Subsections (4) and (5) are concerned with liens. *See* 11 U.S.C. § 362(a)(4), (5). The bankruptcy court does not explain why they are implicated here.

attempt to enforce its pecuniary interests." *NextWave VI*, 244 B.R. at 274. This observation is flatly incompatible with this Court's mandate, as expressed in our earlier opinion. Because the timing of NextWave's payment obligation—like the amount of it—was a subject of FCC regulation, and therefore within our *NextWave* mandate, the bankruptcy court's decision violated that mandate.[8]

In short, notwithstanding the automatic stay provision, the bankruptcy court lacks jurisdiction to decide whether the FCC's regulatory decision is a proper exercise of discretion, or to decide whether it is provident and in the public interest. All of these decisions are within the exclusive jurisdiction of the federal courts of appeals:

> [Petitioner] contends that in order for § 362(b)(4) to obtain, a court must first determine whether the proposed exercise of police or regulatory power is legitimate and that, therefore, in this litigation the lower courts did have the authority to examine the legitimacy of the [agency's] actions and to enjoin those actions. We disagree. [Petitioner's] broad reading of the stay provisions would require bankruptcy courts to scrutinize the validity of every administrative or enforcement action brought against a bankrupt entity. Such a reading is problematic, both because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the

[8] Though we hold that the FCC's regulatory decisions fall within § 362(b)(4), we have no occasion to opine on whether the Public Notice is valid or whether the Licenses automatically canceled at some prior date.

> limited authority Congress has vested in bankruptcy courts.

Board of Governors v. MCorp Fin., Inc., 502 U.S. 32, 40, 112 S. Ct. 459, 464, 116 L. Ed. 2d 358 (1991). The bankruptcy court lacked jurisdiction to declare the Public Notice null and void on any ground: that the Public Notice violated the automatic stay, that the right to cure obviates any default, or that the government was estopped.

NextWave and various amici curiae emphasize that our mandate was limited by the disclaimer in our *NextWave* opinion that "since we do not know what steps the FCC will take vis-a-vis the obligations owed to it by NextWave, any issues created by the FCC's attempts to collect on those obligations are not yet ripe." *Id.* at 59. But the bankruptcy court's latest opinion was not prompted by any *collection* effort; the whole thrust of the opinion is that the FCC is unjustifiably *refusing* to take NextWave's money. In any event, this passage cannot be read as a limitation on the scope or effect of what our opinion actually decided. It is sufficiently clear that the issue raised by the timely-payment requirement was decided in our opinion: "We are merely holding that NextWave may not collaterally attack or impair in the bankruptcy courts the license allocation scheme developed by the FCC." *Id.* at 55. Even if the bankruptcy court is right on the merits of its arguments against revocation—we have no occasion to express an opinion—it is without power to act on its determination:

> [E]ven if the bankruptcy and district courts were right in concluding that granting the Licenses at a small fraction of NextWave's original successful bid

> price best effectuated the FCA's goals, they were *utterly without the power* to order that NextWave be allowed to retain them for that reason or on that basis.

Id. (citation omitted; emphasis added).

The bankruptcy court construes our mandate to mean no more than that the bankruptcy court may not abrogate the full-payment requirement on the basis of a fraudulent-conveyance holding. This under-reads our previous opinion. True, the immediate effect of the mandate was to prohibit abrogation of the full-payment requirement; but the opinion clearly instructs the bankruptcy court to refrain from interfering with the licensing decisions of the FCC.

2. Jurisdiction

Just as this Court may use its mandamus power to require compliance with its mandates, it may also issue the writ to restrain an inferior court to proper exercises of that court's jurisdiction. *See Ex parte Republic of Peru*, 318 U.S. 578, 583, 63 S. Ct. 793, 796-97, 87 L.Ed. 1014 (1943). Our previous decision was founded on congressionally imposed limits on jurisdiction. As discussed below, those jurisdictional limitations apply here with equal force.

Exclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468, 104 S. Ct. 1936, 1939, 80 L.Ed.2d 480 (1984); *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("Exclusive jurisdiction over review of final FCC orders is vested in the Court of

Appeals. . . ."); *see also NextWave* Appeal, 200 F.3d at 54 ("[J]urisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals, *see* 28 U.S.C. § 2342; 47 U.S.C. § 402. . . ."). This exclusivity extends as well to collateral attacks: "A defensive attack on [an FCC decision] is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000).

The jurisdictional statutes leave no opening for the sort of jurisdiction over the FCC that the bankruptcy court seeks to exercise. Each statutory provision that governs appeals and petitions for review from FCC decisions is broadly phrased, as follows:

> Jurisdiction over all but a few FCC regulatory actions is restricted to the courts of appeals:
>
> > *Any proceeding* to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and *in the manner prescribed in chapter 158 of Title 28.*
>
> 47 U.S.C. § 402(a) (emphasis added). The "manner prescribed in chapter 158 of Title 28" confines such petitions to the courts of appeals:
>
> > The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has *exclusive jurisdiction* to enjoin, set aside, suspend

> > (in whole or in part), or to determine the validity of—
> >
> > > (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47. . . .
>
> 28 U.S.C. § 2342 (emphasis added).

Section 402(a) makes an exception for cases that fall under § 402(b), but again offers no opening to the bankruptcy court. Cases that fall within § 402(b) are appealable only in the Court of Appeals for the District of Columbia Circuit:

> > Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
> >
> > . . . . . .
> >
> > > (5) By the holder of any construction permit or *station license* which has been modified or revoked by the Commission.
>
> 47 U.S.C. § 402(b)(5) (emphasis added). PCS licenses are "station licenses" within the technical meaning of § 402(b)(5), and fall within its ambit.[9]

---

[9] The statutory definitions clarify that the term "station license" means the "instrument of authorization required . . . for the use or operation of apparatus for transmission of energy, or communications, or signals by radio." 47 U.S.C. § 153(42) (Supp. 1999). Transmission by radio is defined broadly to include all electromagnetic broadcast transmissions, not just those transmitting traditional broadcast-radio content. *See id.* § 153(33). The FCC

Section 402(b) is applicable to all appeals from the FCC's licensing actions: "The language of this subsection [*i.e.*, § 402(b)], when considered in relation to that of subsection (a), also would make it clear that judicial review of *all cases involving the exercise of the Commission's radio licensing power* is limited to [the Court of Appeals for the D.C. Circuit]." *Cook, Inc. v. United States*, 394 F.2d 84, 86 n.4 (7th Cir. 1968) (quoting S. Rep. No. 82-44, at 10 (1951)) (emphasis added; internal quotation marks omitted). NextWave remains free to pursue its challenge to the FCC's regulatory acts.[10] In response to the FCC's revocation of the

---

has "'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.'" *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168, 88 S. Ct. 1994, 2000, 20 L.Ed.2d 1001 (1968) (quoting S. Rep. No. 73-781, at 1 (1934)) (referring to 47 U.S.C. § 153(b), (cc) (1965), *recodified at* 47 U.S.C. § 153(33), (42) (Supp. 1999)).

[10] Section 402 specifies exclusive jurisdiction for appeals from FCC "decisions" and "orders." Here, the FCC has issued no order formally announcing the cancellation of the Licenses; revocation is made explicit in a filing before the bankruptcy court (which filing is not itself an order) and is implicit in the Public Notice announcing the re-auction of the Licenses previously held by NextWave. Nevertheless, as this Court's prior opinion makes clear, we think that the FCC action in question is unmistakably regulatory in nature. But even if the FCC's acts do not amount to "decisions" or "orders" of the Commission, subject to the jurisdiction of the courts of appeals, that would not expose the FCC's acts to review in the bankruptcy court. A regulatory action short of a decision or order is an exercise of regulatory discretion that is *not* subject to review. *See Bethesda-Chevy Chase Broadcasters, Inc. v. FCC*, 385 F.2d 967, 968 (D.C. Cir. 1967) (holding that a regulatory action that did not impose an obligation, deny a right, or fix a legal relationship was not reviewable); *see also, e.g., Telecommunications Research & Action Ctr.*, 750 F.2d at 78-79 ("[W]here a statute commits review of agency action to the Court of Appeals, any suit

Licenses, NextWave has filed protective notices of appeal in the D.C. Circuit, one under § 402(a) and the other under § 402(b). Cases within § 402(a) and cases within § 402(b) are "mutually exclusive." *Freeman Eng'g Assocs. v. FCC*, 103 F.3d 169, 177 (D.C. Cir. 1997) (citation and internal quotation marks omitted). But as noted in those notices of appeal, NextWave expects that the D.C. Circuit will simply dismiss whichever appeal is improper. *See, e.g., Tribune Co. v. FCC*, 133 F.3d 61, 66 n.4 (D.C. Cir. 1998); *Kessler v. FCC*, 326 F.2d 673, 679 n.4 (D.C. Cir. 1963).

---

seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals." (emphasis added)); *Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1974) ("[T]o be final an order must impose an obligation, deny a right or fix some legal relationship. . . ." (citation and internal quotation marks omitted)).

In this case, we have no doubt that the Public Notice of the Auction of C and F Block Broadband PCS Licenses is an appealable decision or order of the FCC. *See, e.g., Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 520 n.12 (D.C. Cir. 1999) (treating denial of a waiver as an "adjudicatory decision"); *Fidelity Television, Inc. v. FCC*, 502 F.2d 443, 452 (D.C. Cir. 1974); *cf. Mesa Airlines v. United States*, 951 F.2d 1186, 1188 (10th Cir. 1991); *California Assoc. of the Physically Handicapped, Inc. v. FCC*, 833 F.2d 1333, 1334 (9th Cir. 1987).

The FCC's Notice announced that specified licenses—those formerly possessed by NextWave—were to be re-auctioned. It is easy to conclude that this "den[ies] a right." *Illinois Citizens Comm.*, 515 F.2d at 402. And if that decision is appealable, its regulatory nature requires that it be appealed in the court of appeals.

CONCLUSION

We conclude that the bankruptcy court acted in derogation of this Court's mandate and beyond its statutory jurisdiction when it nullified the FCC's Public Notice. The violation of our mandate and the jurisdictional defect are independently sufficient to justify mandamus.

Accordingly, the petition for a writ of mandamus is GRANTED. The bankruptcy court is directed to vacate its order of February 7, 2000, and to enter an order denying NextWave's motion for enforcement of the automatic stay with respect to the Licenses.

APPENDIX E

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Bankruptcy No. 98 B 21529 (ASH)

IN RE NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL., DEBTORS

Jan. 31, 2000

DECISION ON MOTION TO ENFORCE THE AUTOMATIC STAY

ADLAI S. HARDIN, JR., Bankruptcy Judge.

On January 12, 2000 the Federal Communications Commission ("FCC") gave public notice (the "January 12 Declaration") to the debtors (collectively, the "debtors" or "NextWave") in these jointly administered Chapter 11 cases that all of NextWave's C block and F block licenses (the "Licenses") for broadband personal communications service ("PCS") had been automatically cancelled under FCC regulations as of late 1998 or January 1999. The January 12 Declaration was issued a scant nine days before the scheduled January 21, 2000 hearing on NextWave's Modified First Amended Joint Plan of Reorganization (the "Plan"), under which NextWave proposed to pay *in full* the balance of its outstanding installment obligations to the FCC and all amounts owing to unsecured creditors.

Aside from the Draconian economic consequences of cancellation to other creditors and equity, the January 12 Declaration was shocking because it followed over one year of intense litigation costing the debtors' estates upwards of $10 million in professional fees and other expenses in three Federal courts entailing expenditure of untold hours of judicial resources by one Bankruptcy Judge (Hardin), at least four District Judges (Brieant, Parker, Pollack, Chin) and at least three Circuit Judges (McLaughlin, Jacobs, Sack), all of which was premised on the assumption that the Licenses were vested in NextWave, and all of which was utterly unnecessary and incomprehensible if the Licenses had in fact and law been automatically cancelled over a year ago. The January 12 Declaration conflicted with countless written and oral utterances and acts of the FCC throughout the past year. And, astonishingly, the January 12 Declaration followed by one day a letter from the President of NextWave to the Chairman of the FCC offering to satisfy NextWave's entire ten-year installment obligation to the FCC by making a single lump sum payment upon confirmation in excess of $4.3 billion.

Faced with catastrophic consequences to all parties in interest in these debtors' estates, NextWave moved by order to show cause returnable January 21, 2000 for an order holding the FCC's January 12 Declaration null and void on the grounds, *inter alia*, that it violated the automatic stay, 11 U.S.C. § 362(a). As amplified below, the motion is granted for three quite separate reasons: (I) the January 12 Declaration violated the Bankruptcy Code; (II) the debtors cannot be held to have defaulted for failure to make payments on a pre-petition claim which they could not make under the Code without a

court order; and (III) the FCC is barred by its own conduct from asserting a retroactive forfeiture under the doctrines of equitable estoppel and waiver.

Jurisdiction

This Court has jurisdiction over this contested matter under 28 U.S.C. §§ 1334(a) and 157(a) and the "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York dated July 10, 1984 (Ward, Acting C.J.). This is a core proceeding under 28 U.S.C. § 157(b).

Background

The material facts in these Chapter 11 proceedings have been set forth in varying detail in five published decisions of this Court, one decision of the District Court and one published decision of the Court of Appeals, all briefly described below. This decision will set forth the factual and decisional background only to the extent necessary to give context to the issues presented and decided on this motion. For a more comprehensive statement of facts, *see NextWave IV.A*, 235 B.R. 277 (Bkrtcy. S.D.N.Y. 1999).

On May 6 and July 16, 1996, NextWave was declared the high bidder for 63 licenses in the FCC's auction and reauction, respectively, of C block licenses (the "C Licenses"). NextWave filed the required long form applications seeking FCC approval, to which objections were filed. On January 3, 1997 the FCC announced that NextWave would receive its C Licenses, conditioned on compliance with its financial obligations to the FCC.

On January 9, 1997 NextWave made an additional deposit with the FCC bringing its total cash deposits to $474,364,806, or 10% of its total bid price. On February 19, 1997 NextWave executed notes (the "Notes") and accompanying security agreements in the aggregate face amount of $4,269,283,223 (rounded, $4.3 billion), dated as of January 3, 1997. The FCC awarded the C Licenses to NextWave affiliate NPCI.

Another NextWave affiliate was high bidder for certain F block licenses (the "F Licenses") which were issued to NextWave in the spring of 1997. The litigation with the FCC concerned only the C Licenses, until the January 12 Declaration.

Between the conclusion of the C block auction and reauction on May 6 and July 16, 1996 and the actual issuance of the C Licenses in January/February 1997 in exchange for $4.7 billion of cash and Notes, the value of PCS spectrum as perceived in the marketplace plummeted. As a consequence, NextWave and the other C block license winners were unable to raise a single dollar of the estimated $1.6 billion of public financing which the C block licensees needed to build out their PCS systems. Recognizing this fact, the FCC issued orders suspending all payments on both C block and F block licenses in the spring of 1997, conducted public hearings and issued certain restructuring orders.

The NextWave entities filed voluntary petitions under Chapter 11 on June 8, 1998. On the same date NextWave filed the complaint in an adversary proceeding against the FCC alleging two separate causes of action. Count I alleged a claim under Section 544 of the Bankruptcy Code for constructive fraudulent conveyance; Count II sought equitable subordination of the

indebtedness to the FCC under Section 510 of the Bankruptcy Code by reason of the FCC's "*de facto* control" over NextWave and its alleged "inequitable, unconscionable and unfair conduct" between July 1996 and January 1997 (in essence, flooding the market with spectrum in order to drive the "scarcity value" out of spectrum). This Court made six substantive rulings in the adversary proceeding, five memorialized in written decisions. The District Court affirmed all six rulings, and the Court of Appeals reversed the District Court and this Court in a published decision. Each of these rulings will be discussed to the extent appropriate in the context of this motion.

Prior Court Decisions

Nextwave I *(235 B.R. 263)*

In response to the complaint, the FCC simultaneously filed a motion in the District Court to withdraw the reference and a motion to dismiss the adversary proceeding for lack of subject matter jurisdiction. The District Court denied the motion to withdraw the reference in October 1998 and remanded to this Court to decide the motion to dismiss. After a hearing in November, this Court issued its decision denying the motion to dismiss as to Count I (fraudulent conveyance) and granting the motion to the extent of dismissing Count II (equitable subordination). *NextWave I*, 235 B.R. 263 (Bankr. S.D.N.Y. Dec. 7, 1998). Count II was dismissed because "the second cause of action is based upon conduct of the FCC acting in its regulatory capacity [and][t]his Court will decline to review or adjudicate the consequences of the FCC's acts and omissions in matters over which Congress has granted the FCC primary jurisdiction." 235 B.R. at 265. The motion to

dismiss Count I was denied because "the first cause of action arises solely out of the FCC's status as a creditor of NextWave and does not seek to challenge any act or omission of the FCC or to affect the FCC in any manner except in its capacity as a creditor." *Id.* This Court concluded that nothing in the enabling statute, Federal Communications Act ("FCA") § 309(j), or elsewhere in the FCA manifested an intention of Congress to preempt the operation of the Bankruptcy Code in cases where the FCC was acting in the capacity of a creditor, whose actions, rights and obligations as a creditor would affect the rights and obligations of other creditors and parties in interest in a debtor's estate.

NextWave II (235 B.R. 272)

The FCC next made a motion for partial summary judgment fixing the date on which NextWave became obligated to pay the $4.7 billion of its winning bids, a crucial determination in a constructive fraudulent conveyance proceeding where the central issue is whether the consideration given by the debtor (cash plus debt) exceeded the value of the property transferred to the debtor in exchange therefor (the C Licences). Since NextWave's financial obligation to the FCC under the FCC's auction regulations would not have been $4.7 billion but some indeterminable lower figure if for any reason the FCC did not grant NextWave the C Licenses (less than 5% of the $4.7 billion if, for example, the C Licenses were reauctioned for amounts exceeding NextWave's bids), and since the actual transfer of the C Licenses in exchange for $473 million cash and $4.3 billion of Notes did not take place until January/February 1997, this Court fixed January 3, 1997 as the

critical date for constructive fraudulent conveyance purposes.

NextWave III

On April 2, 1999 this Court denied the FCC's second motion to dismiss in an unpublished decision from the bench.

NextWave IV.A (235 B.R. 277)

On May 12, 1999, after a trial on the issue of valuation of the Licenses, this Court issued its Decision on Constructive Fraudulent Conveyance Claim concluding that "$1,023,211,000 may be said to constitute the fair market value of the entire consideration received by NPCI in exchange for the entire $4.7 billion of Transfers, for purposes of fraudulent conveyance analysis." 235 B.R. at 304.

NextWave IV.B *(235 B.R. 305)*

After a further hearing, on June 22, 1999 this Court issued its Decision on Remedy. Noting the "utter irrationality of the FCC's proposed remedy," 235 B.R. at 311, and rejecting the remedy of rescission which the FCC expressly stated was "not what we seek," 235 B.R. at 308, this Court adopted the traditional constructive fraudulent conveyance remedy of avoidance, the effect of which was to reduce the NextWave obligation from $4.7 billion (10% of which has been paid) to $1,023,000,000, being the actual fair market value of the C Licenses in January/February 1997.

NextWave V (235 B.R. 314)

Following the Decision on Remedy, *NextWave IV.B*, the FCC moved to lift the automatic stay under 11 U.S.C. § 362(d)(i) for "cause." The "cause" relied upon was the failure, or rather the prospective failure, of NextWave to pay the full amount ($4.7 billion) of its winning auction bids by reason of this Court's Decision on Remedy in *NextWave IV.B*. As a consequence of the prospective default, the FCC sought an order for relief from stay from this Court so that the Licenses could be automatically cancelled under the terms of the FCC regulations. Considering the issue thus raised to be governed by the initial decision on subject matter jurisdiction in *NextWave I*, this Court ruled that, since the FCC is subject to the Bankruptcy Code in its capacity as a creditor, the reduction in NextWave's obligation to the FCC in the Decision on Remedy did not result in a present or prospective default and, lacking any default, there was no "cause" to lift the stay. Accordingly, the motion was denied.

The District Court Decision

On July 27, 1999 the District Court (Hon. Charles L. Brieant) issued a decision and order affirming all six aforementioned rulings of the Bankruptcy Court. *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311 (S.D.N.Y. 1999).

The Court of Appeals Decision

On November 24, 1999 the Court of Appeals for the Second Circuit issued an order reversing the judgment of the District Court and remanding the case for

further proceedings, with an opinion to follow. The opinion (the "Circuit Court Decision") was issued on December 22, 1999. *Federal Communications Commission v. Nextwave Personal Communications, Inc. (In re Nextwave Personal Communications, Inc.)*, 200 F.3d 43 (2d Cir. 1999). It is not clear whether the FCC appealed *NextWave III*, *NextWave IV.A*, *NextWave IV.B* or *NextWave V*. But it is clear that none of those decisions was addressed in the Circuit Court Decision. The Circuit Court Decision reversed the Bankruptcy Court and the District Court in respect of *NextWave I* and *II*.

With respect to the former, the Circuit Court Decision disagreed with the basic premise of *NextWave I* which distinguished between the FCC acting in its capacity as a regulatory agency, as to which the District Court/Bankruptcy Court would have no subject matter jurisdiction, and the FCC as a creditor, as to which the District Court/Bankruptcy Court would have jurisdiction to adjudicate debtor-creditor issues arising under the Bankruptcy Code. While recognizing the FCC's dual role as creditor and regulator under FCA § 309(j), the Court of Appeals concluded that the "payment in full" requirement of the FCC regulations, while a credit provision in the context of a C block licensee paying in installments, was also related to a regulatory function as to which the FCC had primary jurisdiction. Starting with the Congressional premise, articulated in the legislative history, that "[b]ecause new licenses would be paid for, a competitive bidding system [would] ensure that spectrum is used more productively and

efficiently than if handed out for free," the Circuit Court Decision concluded:

> . . . the FCC made "full and timely payment of the winning bid" a regulatory condition for obtaining and retaining a spectrum license required through a § 309(j) auction. *See* 47 C.F.R. § 24.708.[1]
>
> This "payment in full" requirement has a regulatory purpose related directly to the FCC's implementation of the spectrum auctions.

200 F.3d at 52. Rejecting the Bankruptcy Court's premise that the fraudulent conveyance claim "concern[ed] solely the debtor-creditor relationship between the FCC and [NextWave]" and the District Court's premise that the fraudulent conveyance claims did not "implicate the FCC's power to regulate the issuance or use of spectrum licenses," the Circuit Court Decision said:

> This approach was fundamentally mistaken. The FCC's auction rules promulgated under § 309(j) have primarily a regulatory purpose: to insure that spectrum licenses end up in the hands of those most likely to further Congressionally defined objectives. The fact that market forces are the technique used

[1] 47 C.F.R. § 24.708 states, in relevant part:

> (a) **Except with respect to entities eligible for installment payments** (*see* § 24.711), each winning bidder will be required to pay the balance of its winning bid in a lump sum payment within five (5) business days following the award of the license. Grant of the license will be conditioned upon **full and timely payment** of the winning bid amount. (Emphasis supplied.)

> to achieve that regulatory purpose does not turn the FCC into a mere creditor. . . .

Id. at 54. Having so ruled, the Circuit Court Decision went on to say the following:

> This is not to say that [the District Court and Bankruptcy Court] lacked jurisdiction over every aspect of the relationship between the FCC and NextWave. To the extent that the financial transactions between the two do not touch upon the FCC's regulatory authority, they are indeed like the obligations between ordinary debtors and creditors.

Id. at 55. And in footnote 11 on the same page, the Circuit Court Decision said:

> 11. The bankruptcy court held: "The basic defect in the FCC's argument is that Congress did not confer upon the FCC the power to determine unilaterally its own rights as a creditor in competition with and to the detriment of other creditors." *NextWave I*, 235 B.R. at 270. That is surely true. But as we have repeatedly stated, that analysis is misplaced if it allows the bankruptcy court to adjudicate claims against the FCC not as a creditor, but as an allocation of licenses. Such was the case here. . . .

Thus, the Circuit Court Decision "remand[ed] the case to the bankruptcy court for further proceedings consistent with this opinion, if any are necessary." *Id.* at 62.

Turning to *Nextwave II*, the Circuit Court Decision concluded that "NextWave became obligated to the

FCC for the full amount of its winning bids at the close of the C-block auction, and that the transaction in which the Licenses were issued was therefore not constructively fraudulent." *Id.* at 56.

The Circuit Court Decision agreed with the proposition (quoting from *NextWave IV.A*, 235 B.R. at 290) "that the question of reasonably equivalent value is determined by the 'value of the consideration exchanged between the parties *at the time of the conveyance or incurrence of the debt* which is challenged.'" *Id.*; emphasis in Circuit Court Decision. Accordingly, "[t]he date on which the payment obligation arose is therefore crucial to whether this obligation is avoidable." *Id.* at 56. The Circuit Court Decision framed the issues as follows:

> When did NextWave take on the obligation to pay $4.74 billion for what it bid at auction? And that question suggests another: What did NextWave bid $4.74 billion to get?

Id. at 57. The Circuit Court Decision answered the latter question: "We conclude that NextWave bid $4.74 billion for the right—excluding other bidders—to be the qualified licensee of the licenses." *Id.* at 57.[2] On this premise, the Circuit Court Decision held that

---

[2] This Court ruled in *Nextwave II* that NextWave's cash payments and Notes aggregating $4.74 billion were consideration not for the mere *right* to be the qualified licensee, but for the actual C Licenses themselves. In fact, as shown in *NextWave IV.A*, 235 B.R. at 291-93, NextWave's only *irrevocable* financial commitment (its "ticket of admission" to the approval process) at the close of the auctions was the 3% penalty (equating to $142,309,000) under the FCC regulations, 47 C.F.R. § 1.204(g)(2), although its contingent liability was much greater. *See* footnote 3.

"NextWave became obligated to the FCC for the full amount of its winning bids at the close of the C-block auction." *Id.* at 56.[3]

Confirmation Proceedings

NextWave's First Amended Disclosure Statement was approved by order dated July 27, 1999. Over 99% of all creditors and equity interest holders who submitted ballots voted in support of the debtors' Plan, and a hearing on confirmation of the Plan was scheduled for September 8, 1999. On August 31, 1999 the Court of Appeals granted the FCC's motion for a stay of the confirmation hearing pending appeal.

On December 16, 1999, NextWave filed modifications to the Plan, providing, *inter alia*, that the debtors would pay all unsecured creditors and the FCC *in full*, regardless of the outcome of the appeal pending in the Circuit Court. The confirmation hearing on NextWave's modified Plan was further adjourned, ultimately to January 21, 2000.

---

[3] In *NextWave II* this Court concluded that, at the close of the C block auctions, NextWave did not incur a *liability* for its $4.74 billion aggregate winning bids—it incurred a *contingent liability*, necessarily less than $4.7 billion, for penalties including the difference between NextWave's winning bids and the winning bids in a subsequent reauction of the C Licenses. Thus, if the C Licenses had been reauctioned for $4.74 billion or more, the contingent liability could have been reduced to less than 5% of $4.74 billion. Moreover, the issue in the fraudulent conveyance proceeding did not concern a hypothetical, unquantifiable and non-existent contingent liability for penalties; it concerned the value of the consideration actually received by NextWave (the C Licenses) in exchange for its actual cash payments and Notes issued in February 1997 aggregating $4.74 billion.

Seeking to persuade the FCC to reach an agreement, NextWave's President wrote to the FCC Chairman on December 29 explaining that under its modified Plan NextWave would pay the FCC, at confirmation, "an amount equal to all principal and interest accrued to date, plus any applicable late payment fees," and thereafter NextWave "would resume quarterly payments of its $4.3 billion principal and over $1.5 billion interest obligation in accordance with the Commission's schedules, lasting through the Company's PCS license term" (NextWave letter dated December 29, 1999 to the FCC Chairman, Exhibit A annexed to Bevel Declaration).

Continuing its negotiations with the FCC, by letter to the FCC Chairman dated January 11, 2000 and delivered on that date, NextWave proposed

> an arrangement under which NextWave would make a single lump sum payment at confirmation to satisfy its entire obligation [in excess of $4.3 billion] to the FCC. Accelerating all our payments in this manner would eliminate any future installment payments, and would provide the Commission with absolute assurance that it will never have to deal with the issue of collecting any additional license payments from NextWave.

Exhibit B to Bevel Declaration.

The January 12 Declaration

The FCC responded to NextWave's January 11 letter by issuing the January 12 Declaration. This consisted of three documents, all dated and issued January 12: the FCC's formal objection to NextWave's Modified Plan; a news release bearing the headline "FCC Informs Court That NextWave Licenses Have Cancelled and Sets Date for Auction;" and a Public Notice of "Auction of C and F Block Broad Band PCS Licenses" scheduled for July 26, 2000.

It is important to note that *at no time* prior to the January 12 Declaration did the FCC ever assert the position, or even intimate, that NextWave's C and F Licenses had automatically cancelled in late 1998 or early 1999 or at any other time on account of a default resulting from the passage of some ambiguous deadline for the payment of some unquantified amount in respect of the FCC's pre-petition claims against NextWave. To the contrary, the FCC made repeated declarations in judicial proceedings utterly inconsistent with the notion that NextWave's Licenses automatically cancelled in January 1999, and all three Federal courts which have issued rulings in these proceedings have done so upon the assumption that the licenses were not cancelled.[4]

The Alleged "Default"

The foundation of the January 12 Declaration of cancellation of the Licenses is a "default" by NextWave in its installment obligations under the Notes. The threshold question is whether there was a "default," in

---

[4] For example, the Court of Appeals said:

> . . . [T]he FCC has not yet sought to take any action vis-a-vis the Licenses. While it would probably be fair to assume that the FCC will seek to revoke the Licenses and collect on its debts, we cannot presume to know in advance the course that the agency will ultimately follow. . . . It is possible that if the FCC chooses to pursue some of these options—say, collection on the notes—it may find itself acting as a creditor. (200 F.3d at 59 n.15).

the sense of a legal breach of duty having enforceable legal consequences, as distinguished from a "default" in the colloquial sense of failure to pay timely under some legally suspended, superceded or otherwise unenforceable obligation.

It is, of course, true that there has been a delay in payment of principal and interest under the Notes, and that delay will persist until the debtors' Plan becomes effective, if it ever does. It is also true that past due installments, interest and penalties have not been waived or forgiven and will have to be paid, or the Licenses ultimately will be cancelled. But it does not follow that NextWave's failure to pay timely under the terms of the Notes or the FCC regulations constituted a legal "default" triggering forfeiture of the Licenses.

The alleged "default" is phantom for two quite different reasons.

First, the retroactive declaration of forfeiture for failure to pay an unquantified and possibly unquantifiable amount, within an unspecified and possibly undeterminable deadline, with no prior notice and therefore no opportunity to comply with the obligation (whatever the obligation was) raises serious questions of Constitutional deprivation of property without due process of law. The existence of a default here depends upon an interpretation of the FCC's regulations, because all payments by C and F block licensees were suspended by FCC orders in March and April 1997. As shown in Appendix A to this decision, the FCC regulations concerning resumption of payment obligations are numerous, complex and confusing both as to payment deadlines and amounts due. It appears that the FCC itself is incapable of determining even now, long after the fact,

either the date(s) of NextWave's default(s) or the amount(s) then due. It is offensive to due process to make a retroactive declaration of cancellation of property rights based upon a "default" more than a year ago which cannot be identified either as to date or amount due, of which the debtors had no fair notice and no opportunity to cure.

Transcendent considerations of fairness and due process, as expressed in the very statute that governs the FCC, compel the conclusion that the FCC cannot summarily eviscerate the debtors' estate on the basis of a purported "regulatory default." The FCA requires notice and an opportunity to be heard where violations touching its regulatory purview warrant the revocation or suspension of a license. *See* 47 U.S.C. § 312 ("Administrative Sanctions"—requiring the FCC to serve an order to show cause on thirty days' notice for station license revocation procedures or cease and desist orders) and 47 U.S.C. § 303 ("Powers of the Commission"—requiring fifteen days' notice and opportunity to request a hearing for actions taken to suspend an operator's license). The Bankruptcy Code also requires, as an element of basic fairness and due process, notice, a hearing and court approval before actions impacting vital interests may be taken. The FCC's reliance upon a purported "regulatory" default, itself premised upon constantly shifting and sometimes inconsistent agency interpretations, only exacerbates the fundamental unfairness of its action. Deprivation of property by agency fiat, without any procedural or due process safeguards, cannot be countenanced.

Second, the debtors' failure to make post-petition payments on the Notes cannot be deemed a legal

"default" triggering a forfeiture of the Licenses because such payments were prohibited under the Bankruptcy Code. Even if the FCC regulations suspending the 1997 suspension orders clearly and unambiguously specified payment deadlines and amounts due for C and F block licensees, the payment obligations thus identified were necessarily suspended for the NextWave debtors upon their filing petitions under Chapter 11 on June 8, 1998. As shown in point II, below, the Bankruptcy Code prohibits a debtor from making payments on pre-petition claims to a select creditor or creditors. With exceptions not here applicable, under Section 363 and other provisions of the Code the debtors' property can be used to pay pre-petition claims only pursuant to court order or in the context of a confirmed plan of reorganization. Since a Chapter 11 debtor is precluded from making post-petition payments on a pre-petition claim, NextWave's failure to make payments on the Notes in accordance with a time schedule set by the Notes or by the FCC regulations cannot be deemed a legal "default" triggering automatic cancellation of the Licenses.

The Alleged "Automatic" Cancellation

The FCC's authority for automatic cancellation is 47 C.F.R. § 1.2110(f)(4)(iv), which provides:

> (iv) Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day nondelinquency period and subsequent automatic grace period, if such a grace period is available, *will be declared in default*, its license will automatically cancel, and will be subject to debt collection procedures. (emphasis supplied)

Under the regulation, a "default" must "be declared" before "automatic" cancellation can occur.

The FCC argued that, despite the language "will be declared in default," it was incumbent on the debtors, before a "default" occurred, to seek an extension or waiver before any discretion of the FCC could be invoked. The history of this regulation indicates otherwise. As originally promulgated in 1994, the default and cancellation provision read as follows:

> (4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.
>
> (i) If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default.
>
> (ii) Upon default or in anticipation of default of one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction buildout requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. If the Commission grants a request for a grace period, or otherwise

approves a restructured payment schedule, interest will continue to accrue and will be amortized over the remaining term of the license.

(iii) Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to Part 1, Subpart O.

59 FR 44272-01 at 44298 (Implementation of Section 309(j) of the Communications Act—Competitive Bidding, August 26, 1994) (emphasis supplied). As originally promulgated, it was indeed up to the licensee to actively request a grace period, and there was no requirement that a default be "declared." But this language was changed to the now applicable "will be declared in default." The FCC never declared a default.

The FCC has argued that the "automatic" cancellation provision is analogous to the regulations in *In re Gull Air, Inc.*, 890 F.2d 1255 (1st Cir. 1989) and *In re Yellow Cab Co-op. Ass'n*, 132 F.3d 591 (10th Cir. 1997), where cancellation involved no action and no exercise of judgment or discretion on the part of the administrative agency. The licenses for airport landing slots in *Gull Air* and taxicab medallions in *Yellow Cab*, by their terms, depended for their continued existence on actual utilization of the landing slots and taxicab medallions and lapsed when no longer used. Thus, termination of the licenses took place with no act, declaration, judgment or discretion exercised or exercisable by the regulatory agency.

The facts are quite different here. Cancellation in this case is not predicated on a "use it or lose it" requirement, but upon delay in payment. The regulation involved requires the FCC to do something (declare a default), and the FCC has the power, in its sole judgment and discretion, to suspend, reinstate and repeatedly change deadlines for payment of C and F block spectrum licenses, both generally and for specific licensees, and to waive payment defaults, and it has repeatedly exercised that power, all as documented in Appendix A.

Moreover, even if the regulation did not require a declaration of default and the FCC did not have discretion to suspend, reinstate, extend and waive payment deadlines, it is still not accurate to say that cancellation is truly "automatic." This is so because, in the real world, unless and until the FCC takes some affirmative action to assert dominion over the licenses of a defaulting licensee, life will go on as before and the parties (including the FCC) will go on spending millions of dollars in litigation costs, DIP lenders will continue lending millions of dollars secured by the licenses, the licensee will continue to expend money in preparation to build out its PCS systems and the courts will continue to expend countless hours of judicial resources, all on the assumption that the licenses have not cancelled. And that is exactly what happened in this case.

Finally, it is not true that no agency discretion is involved in the cancellation. The Restructuring Orders themselves are replete with agency considerations justifying decisions to either extend or refuse to extend the automatic grace periods. If the FCC has sufficient discretion to suspend payments, extend grace periods

and grant waivers in the cases of individual licensees, then the contention that the automatic cancellation provision involves no agency discretion is untenable. The very timing of the January 12 Declaration shows a calculated act designed to divest the debtors of the Licenses immediately after the January 11 letter, and before the January 21 confirmation hearing. The cancellation may be "automatic," but it must nevertheless be invoked. It is that invocation, on January 12, 2000, which is the subject of the debtors' motion.

Discussion

I. *The FCC's January 12 Declaration violated the Bankruptcy Code.*

The FCA does not preempt the Bankruptcy Code.[5] One cannot point to any language in the FCA that expressly or impliedly purports to limit, abridge or affect the Code insofar as it would apply to the FCC as a creditor. Before turning to the FCC's arguments in opposition, we shall examine the Bankruptcy Code implications of the January 12 Declaration.

A. *The automatic stay*

The automatic stay provided for in Section 362(a) of the Bankruptcy Code is one of the statutory cornerstones of the bankruptcy and reorganization process. It ensures (i) that the assets of a debtor's estate remain intact for adjudication by the Bankruptcy Court and (ii) equality of distribution to creditors in accordance with the priority and distribution scheme of the Code."[6] *See*

[5] "The FCC makes no claim that the FCA supercedes the Bankruptcy Code." FCC Memorandum in Opposition at 11 ftn. 3.

[6] The legislative history states:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), U.S. Code Cong. & Admin. News p. 6296, reprinted in Collier on Bankruptcy App. Pt. 4(d)(i); S. Rep. No. 989, 95th Cong., 2d Sess. 54-55 (1978), U.S. Code Cong. & Admin. News pp. 5840-5841, reprinted in Collier on Bankruptcy App. Pt. 4(e)(i).

e.g., In re Parr Meadows Racing Association, Inc., 880 F.2d 1540, 1545 (2d Cir. 1989) (Bankruptcy Code "requires that all creditors, both public and private, be subject to the automatic stay"), *cert. denied sub nom., Suffolk County Treasurer v. Barr*, 493 U.S. 1058, 110 S. Ct. 869, 107 L. Ed. 2d 953 (1990). It also ensures that contractual and State or Federal law rights and remedies such as acceleration, forfeiture, imposition of judgment liens and foreclosure will be precluded, held in abeyance or in some cases "cured" and thereby reversed, in order that the ultimate objective of reorganization in Chapter 11 or Chapter 13 for the benefit of all creditors will not be thwarted by the action of a single creditor. *In re Monroe Park*, 18 B.R. 790, 791 (Bankr. D. Del. 1982) ("It is clear that Congress intended a financially troubled debtor to be able to reorganize after there has been a default and acceleration even in the face of state law which requires the consent of the creditor for cure and reinstatement once the entire amount has become due.") *See* point I B, below. As noted in *Collier on Bankruptcy*:

> In reorganization cases, the stay is particularly important in maintaining the status quo and permitting the debtor in possession or trustee to attempt to formulate a plan of reorganization. Without the stay, the debtor's assets might well be dismembered, and its business destroyed, before the debtor has an opportunity to put forward a plan for future operations. Secured creditors and judgment creditors might race to seize and sell the debtor's assets in order to obtain satisfaction of their claims, without regard to the interests of other creditors or the value of keeping assets together in an operating business. The stay prevents this piecemeal liquidation, offering the chance to maximize the value of the business.

3 *Collier on Bankruptcy* ¶ 362.03[2] at pp. 362-15 (15th Ed. rev. 1999).

The courts in this Circuit hold that any action taken in violation of the automatic stay is void and without force or effect. *48th Street Steakhouse, Inc. v. Rockefeller Group, Inc.* (*In re 48th Street Steakhouse, Inc.*), 835 F.2d 427, 431 (2d Cir. 1987) ("actions taken in violation of the stay are void and without effect" (quoting *Collier on Bankruptcy*)), *cert. denied*, 485 U.S. 1035, 108 S. Ct. 1596, 99 L. Ed. 2d 910 (1988). *See also Shimer v. Fugazy Express, Inc.* (*In re Fugazy Express, Inc.*), 114 B.R. 865, 873 (Bankr. S.D.N.Y. 1990) ("[s]ince § 362 of the Code stays all enforcement activity automatically, the 1988 FCC letter [purportedly canceling the license] is accordingly without effect" (citing *In re Garrett*, 47 B.R. 170, 171 (Bankr. E.D.N.Y. 1985) ("[t]he action of a party in violation of the stay without court approval is

void and without effect"))), *aff'd*, 124 B.R. 426 (S.D.N.Y. 1991).

The automatic stay is embodied in 11 U.S.C. § 362(a). Section 362(a) provides as follows, in relevant part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301 . . . of this title . . . operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation . . . of a[n] . . . administrative, or other action or proceeding against the debtor . . . to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> * * *
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to . . . enforce any lien against property of the estate;
>
> (5) any act to . . . enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

All of the quoted subsections of Section 362(a) are implicated by the FCC's issuance of the January 12

Declaration. There can be no question that the FCC's act is claim-based—the January 12 Declaration of cancellation was explicitly and exclusively predicated upon NextWave's failure to make timely payment of installments due post-petition on the FCC's prepetition claim under the Notes. There can be no doubt that the Licenses constitute "property of the estate" under Section 541 of the Bankruptcy Code.[7] The January 12

---

[7] The FCC has never argued that the licenses are not property of the estate. Section 541 is broadly construed to encompass all conceivable interests of the debtor in property, *United States* v. *Whiting Pools*, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983). Although the Circuit Court Decision stated in different context that a license "does not convey a property right" in the traditional sense (200 F.3d at 51), the law is clear that possessory and intangible interests in general and FCC licenses in particular do constitute property of the estate in bankruptcy. *See e.g., In re Central Arkansas Broadcasting Company*, 68 F.3d 213, 214 (8th Cir. 1995) (interests of debtor in FCC license property of the estate); *In re Tak Communications Inc.*, 985 F.2d 916 (7th Cir. 1993) (same); *In re PBR Communications Systems, Inc.*, 172 B.R. 132, 134 (Bankr. S.D. Fla. 1994) (same); *In re Ridgely Communications, Inc.*, 139 B.R. 374 (Bankr. D. Md. 1992) (same); *Shimer* v. *Fugazy Express, Inc.* (*In re Fugazy Express, Inc.*), 114 B.R. 865, 870-71 (Bankr. S.D.N.Y. 1990), *aff'd*, 124 B.R. 426 (S.D.N.Y. 1991) (same). Upon the grant of the licenses, the debtors were required to execute not only the Notes but security agreements giving the FCC "a first lien on and continuing security interest in all of the Debtor's rights and interests in the License and all proceeds, profits and products of any sale of or other disposition thereof. . . ." The FCC filed UCC financing statements in several jurisdictions, putting the world on notice of its security interest in the licenses. A "security interest" is an "interest in property obtained pursuant to a security agreement." *Black's Law Dictionary* (6th ed. 1990) at 1357. Uniform Commercial Code § 1-201(37) provides "'Security Interest' means an interest in personal property or fixtures which secures payment or performance of an obligation."

Declaration implicates subsections (1) and (6), and it unarguably violated subsections (3), (4) and (5).

Accordingly, the January 12 Declaration was void.

B. *The right to cure defaults and reinstate obligations to avoid forfeiture and facilitate reorganization*

One of the essential objectives of the automatic stay under Section 362(a) is to avoid the effective nullification of other provisions of the Bankruptcy Code designed to facilitate the central Code objective of reorganization, including the right to cure defaults under Sections 1123(a)(5)(G) and 1124(2)(A). Section 1123(a)(5)(G) provides that "a plan shall . . . (5) provide adequate means for the plan's implementation, such as . . . (G) curing or waiving any default." Section 1124(2)(A) expressly contemplates a plan which "(A) cures any such default that occurred before or after the commencement of the case under this title," and this applies "(2) notwithstanding any contractual provision *or applicable law* that entitles" a creditor to demand or receive accelerated payment.

Thus, even if there was a default in the "timely" payment of installments under the Notes, the Bankruptcy Code explicitly provides for the right to cure the default and reinstate the obligation. The "cure," although not defined, is "reversal" of the event that triggered the default and a return to a pre-default status quo. *DiPierro v. Taddeo (In re Taddeo)*, 685 F.2d 24, 26-27 (2d Cir. 1982); *In re Liberty Warehouse Assocs. Ltd. Partnership*, 220 B.R. 546, 548 (Bankr. S.D.N.Y. 1998) ("Under § 1124(2), a debtor can cure its prepetition default under a note or other debt instrument").

As concisely stated by the Second Circuit, "[c]uring a default commonly means taking care of the triggering event and returning to pre-default conditions. The consequences are thus nullified." *Taddeo*, 685 F.2d at 27.

Although *Taddeo* was a Chapter 13 case, its holding applies with equal force in the Chapter 11 context, as the language in both Chapters is substantially similar. *Compare* 11 U.S.C. § 1322(b)(5) (stating that a chapter 13 plan may "provide for the curing of any default within a reasonable time. . . .") *with* 11 U.S.C. § 1123(a)(5) (quoted above) *and* 11 U.S.C. § 1124(2)(A) (quoted above) *and* 11 U.S.C. § 1222(B)(5) (stating that a plan may "provide for the curing of any default within a reasonable time. . . ."). Furthermore, the concept of "cure" and/or reinstatement appears throughout the Bankruptcy Code and is globally intended to permit a debtor to put the debt in question back on track and effect a reorganization. *See* 11 U.S.C. §§ 365(b)(1),[8] 1110(a)(1)(B),[9] 1168(a)(1)(B),[10] and the sections cited and quoted above. This concept and the intent behind it is borne out by the legislative history to Section 1124(2), which states that

---

[8] Providing that if there has been a default in an executory contract or unexpired lease, in order to be assumed, the trustee must "cure[] or provide[] adequate assurance that the trustee will promptly cure, such default."

[9] Allowing secured party to take possession of aircraft equipment and vessels unless a default under the security agreement, lease or contract is cured.

[10] Allowing secured party to take possession of rolling stock or accessories thereto unless a default under the security agreement, lease or contract is cured.

> *a claim or interest is unimpaired by curing the effect of a default and reinstating the original terms of an obligation when maturity was brought on or accelerated by the default. The intervention of bankruptcy and the defaults represent a temporary crisis which the plan of reorganization is intended to clear away. The holder of a claim or interest who under the plan is restored to his original position, when others receive less or get nothing at all, is fortunate indeed and has no cause to complain.* Curing of the default and the assumption of the debt in accordance with its terms is an important reorganization technique for dealing with a particular class of claims, especially secured claims.

S. Rep. No. 989, 95th Cong., 2d Sess. 120 (1978), U.S. Code Cong. & Admin. News p. 5906 (emphasis supplied). "In short, 'curing a default' in Chapter 11 means . . . the event of default is remedied and the consequences are nullified." *Taddeo*, 685 F.2d at 29.

No more dramatic exemplar of the rehabilitative objectives of the "cure" provisions of the Bankruptcy Code could be imagined than this very case. NextWave has proposed in its Modified Plan to pay upon confirmation all amounts accrued and owing to the FCC through the date of confirmation (including installment payments, interest, late charges and penalties), reinstate the payment schedule initially agreed to with the FCC and specified in the Notes, and pay all unsecured creditors, *in full*. If the statutory right to cure were not honored and the FCC were permitted to reclaim NextWave's licenses by retroactive forfeiture, the result would be economic catastrophe for the holders of $627 million of secured and unsecured debts and the

probable destruction of any value in NextWave for equity holders who invested $420 million. The FCC itself would forfeit for the public full payment of the entire $4.7 billion bid by NextWave for the C Licenses, plus interest and late fees. Perhaps the FCC speculates it may achieve a greater financial return for the public in the scheduled July 26 auction of NextWave's licenses, but that is an equation expressly forbidden by the governing statute, FCA § 309(j)(7)(A), discussed in point IV, below.

C. *The prohibition against discriminatory treatment*

For this Court to give legal effect to retroactive cancellation of the Licenses would effectively validate the functional equivalent of an *ipso facto* provision (also referred to as a bankruptcy default provision), which serves to inflict a penalty or forfeiture on a debtor for exercising a Federal right. *Taylor v. Albany Employees Federal Credit Union* (*In re Taylor*), 146 B.R. 41, 46-47 (M.D. Ga. 1992) (holding *ipso facto* clauses invalid as a matter of law because they serve to penalize debtors from exercising their federal right to file for bankruptcy), *rev'd on other grounds*, 3 F.3d 1512 (11th Cir. 1993); *Riggs Nat'l Bank of Washington, D.C. v. Perry* (*In re Perry*), 29 B.R. 787, 790-91 (D. Md. 1983) (holding that *ipso facto* clauses are unenforceable as a matter of law because they unfairly tip the scale in favor of creditors by effectively granting automatic relief from the automatic stay), *aff'd*, 729 F.2d 982 (4th Cir. 1984); *General Motors Acceptance Corp. v. Rose* (*In re Rose*), 21 B.R. 272, 275-79 (Bankr. D.N.J. 1982) ("Enforceability of these clauses would, in effect, render a penalty on debtors." *Id.* at 277). *See also* 7

Collier on Bankruptcy ¶ 1124.03[2] at p. 1124-10 (15th Ed. rev. 1999) (stating that Section 1124(a)(2) of the Bankruptcy Code "permits the plan to reinstate the maturity of a claim or interest without curing any defaults with respect to the financial condition of the debtor that are included in the Section 365(b)(2)(A) *ipso facto* clauses. This interpretation of Section 1124(a) is correct").

Section 525(a) of the Bankruptcy Code is a statutory companion of the foregoing principle. Section 525(a) prohibits a governmental unit from revoking a license in retaliation for commencement or prosecution of a bankruptcy case or the alleged nonpayment of a prepetition claim. The statute provides, in relevant part:

> (a) Except as provided in [not applicable], a governmental unit may not deny, revoke, suspend or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against . . . a person that is or has been a debtor under this title . . . or another person with whom such debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title . . . or has not paid a debt that is dischargeable in the case under this title. . . .

See, e.g., *In re Bill*, 90 B.R. 651, 658 (Bankr. D.N.J. 1988) (suspending driver's license for failure to pay surcharge violated § 525); *In re The Bible Speaks*, 69 B.R. 368, 373 (Bankr. D. Mass. 1987).[11] It is well recog-

---

[11] Stating that:

> It is not consistent with the statute to permit the Board to act based upon a Chapter 11 school's insolvency merely because it

nized that "[t]he prohibition against discrimination based upon the filing of a bankruptcy case necessarily extends to discrimination based upon automatic or likely consequences of such filing." 4 *Collier on Bankruptcy* ¶ 525.02[1] at pp. 525-7.

It appears that the FCC has violated Section 525 in its attempt to retroactively cancel the Licenses. The apparent discrimination is alleged in two forms.

One form is the alleged differences in treatment of NextWave, on the one hand, and other C block and other spectrum license holders, on the other, summarized in the submission of debtors' counsel. To establish this form of discrimination would require discovery proceedings and an evidentiary hearing to afford both sides procedural due process.

The other form of discrimination appears from the facts which are before the Court. After a year of intense litigation the FCC has been vindicated in the Court of Appeals in its contention that a regulatory purpose was implicit in the "full payment requirement" in the FCC regulations. That regulatory objective is fulfilled in the debtors' modified Plan now awaiting a confirmation hearing. It would have been more than fully served under the NextWave proposal of January

---

takes such action with respect to all schools who are insolvent, whether they are inside or outside of bankruptcy. Such an interpretation preserves the "fresh start" policy of the Bankruptcy Code. It prevents the Debtor's present financial difficulties from being the charter for his future. It also promotes the policy of allowing the Debtor breathing room and a respite from outside pressure.

The Bible Speaks, 69 B.R. at 373 (footnote omitted).

11 to pay the entire $4.3 billion outstanding obligation in a lump sum upon confirmation, rather than in installments over the next seven years. As further amplified under point IV, below, the FCC has not and cannot articulate any regulatory interest entailed in the "timely payment" requirement for the modest delay in interest and installment payments to date. The "timely payment" requirement is purely economic (*i.e.*, the time value of money), and the economic consequence of delay will be fully cured by payment in full of all applicable interest, penalties and late fees upon confirmation under the debtor's modified Plan, if the Plan is ever allowed to reach a confirmation hearing and is confirmed.

Lacking any comprehensible regulatory objective, one must consider the consequences of the FCC's January 12 Declaration. As stated by the FCC in its Objection to confirmation, reorganization of NextWave without the Licenses would be impossible, and the debtors' assets would likely be liquidated and sold in Chapter 7. Equity investors could suffer a total loss on their investments aggregating $420 million. Secured and unsecured debt aggregating $627 million might recover a small percentage. The FCC (or rather, the public fisc) may also suffer economically, perhaps severely. The proposed July 26, 2000 reauction of NextWave's C and F Licenses will be open only to "designated entities" qualified to bid for C and F block spectrum under the FCC's regulations. Designated entities are by definition start-up, entrepreneurial entities and regional telephone companies lacking the financial resources of the major players in the wireless market, such as AT & T, Sprint and Nextel. In the 1999 reauction of predominantly C block spectrum, 34

licenses received no bids, and the rest were sold at values equating to a small fraction of the approximately $4.7 billion plus interest and late fees to be paid by NextWave under its modified Plan.

Finally, one of the important statutory objectives of FCA § 309(j), rapid deployment and utilization of C and F block spectrum by designated entities, would be undermined by cancellation and reauction of the Licenses. Judging by the C, D, E and F block auctions, it is highly unlikely that licenses auctioned beginning on July 26, 2000 would result in final grant of the Licenses to the high bidders before winter or spring 2001, at which time the designated entity licensees would have to raise the necessary funding to begin building out their PCS systems. NextWave is a designated entity. It was awarded the Licenses in January 1997. It represents that it has already developed the necessary infrastructure to a considerable degree. It is prepared to put the Licenses into use almost immediately. And all this must be considered in light of the fact that PCS and wireless telephony [*sic*] is developing at lightning speed, such that another year's delay is of great significance.

These facts would appear to present a clear and convincing *prima facie* case of retaliation in violation of Section 525. However, I am reluctant to make a finding that an agency of the United States Government has acted with *mala fides* in the conduct of its statutory duties without giving the FCC a further opportunity to present evidence and argument in support of a good faith, non-retaliatory explanation for its actions and, correspondingly, counsel for NextWave an opportunity to examine into the Agency's motivation through ap-

propriate discovery. Accordingly, I shall not rule upon the debtors' argument under Section 525. In the hope that a ruling may be rendered unnecessary by the course of events, I shall order the parties to desist from further proceedings in respect of Section 525 until one side or the other makes an appropriate request on the record, either orally or in writing, to reopen the issue.

D. *The FCC's bankruptcy law contentions*

The FCC's contention that the January 12 Declaration did not constitute an "act" violating the automatic stay within the meaning of subsections (3), (4) and (5) of Section 362(a) because the cancellation was "automatic" as of late 1988 or January 1999 does not withstand analysis. As already explained, even if the cancellation were truly "automatic" it would mean nothing unless the FCC did something to "exercise control over," or "enforce [its] lien against" the Licenses. Until the FCC took an affirmative "act" with respect to the Licenses —the January 12 Declaration—no one even knew of the putative cancellation, and all parties (including the FCC) and all three Federal courts proceeded upon the assumption that the Licenses were the property of the NextWave estate. The FCC's argument is too facile. A first-time act of dominion over property of the debtors' estate cannot be exempted from the operation of Section 362(a) by an expedient, post hoc assertion that no present act occurred because it all happened "automatically" more than a year ago.

The automatic stay is broadly written and broadly construed. Section 362(a)(3), (4) and (5) stay "any act" to obtain possession of, exercise control over, or enforce a lien against, property of the estate. *Delpit v. Commissioner of Internal Revenue Service*, 18 F.3d 768, 771

(9th Cir. 1994) ("[s]ection 362 'is exceedingly broad in scope' and 'should apply to almost any type of formal or informal action against the debtor or the property of the estate'" (quoting *Collier on Bankruptcy*)). There is no dispute that it applies to the Federal government and its agencies, such as the IRS and the FCC. *Fugazy Express*, 114 B.R. at 872-73 ("at the time of the filing the License was property of the Debtor's estate and had remained so. The FCC was subject to the automatic stay and precluded from rendering any administrative cancellation of the License once the Debtor filed a petition in bankruptcy. . . . Thus, the License remained property of the estate, even though administratively it became subject to cancellation." *id.* at 873).

Contrary to the FCC's arguments (and the *Gull Air* and *Yellow Cab* decisions, discussed above), there is substantial authority holding that regulatory provisions which interfere with property of a debtor's estate, even by "automatic" operation of the regulation, violate the automatic stay. *See, In re American Central Airlines, Inc.*, 52 B.R. 567, 569-571 (Bankr. N.D. Iowa 1985) (stating that, with respect to administrative action to reallocate FAA landing slots, "[t]he mere fact that an interest exists by the grace of government no longer precludes the interest from being treated as a property right," *id.* at 571, and holding that "any act to enforce this [use it or lose it] contractual provision against the Debtor's will constitutes an act to obtain possession of property of the estate and an attempt to exercise control over property of the estate," *id.* at 570, and an "unlawful act" in violation of 11 U.S.C. § 362(a)(3), *id.* at 571). "[R]egulatory provisions in direct conflict with control of the property [of the debtor's estate] by the Bankruptcy Court violate the automatic stay." *In re*

National Cattle Congress, Inc., 179 B.R. 588, 597 (Bankr. N.D. Iowa 1995) (citing *MCorp. Financial Inc. v. Board of Governors of Federal Reserve System*, 502 U.S. 32, 39, 112 S. Ct. 459, 116 L.Ed.2d 358 (1991) and *Missouri v. U.S. Bankruptcy Court*, 647 F.2d 768, 776 (8th Cir. 1981), *cert. denied*, 479 U.S. 910, 107 S. Ct. 307, 93 L.Ed.2d 282 (1986)), *remanded on other grounds*, 91 F.3d 1113 (1996). Under this authority, an FCC regulation effecting automatic cancellation of a debtor's property rights by reason of any default would itself violate the automatic stay.

Furthermore, the term "act" as employed in Section 362 must be broadly construed to include the failure to stop actions that could have been stopped. 3 *Collier on Bankruptcy* ¶ 362.03[8] at 362-63 (15th Ed. rev. 1999); *see In re Hellums*, 772 F.2d 379 (7th Cir. 1985); *In re Sucre*, 226 B.R. 340, 347 (Bankr. S.D.N.Y. 1998) (creditor has affirmative duty to discontinue garnishment action). The FCC certainly had the discretionary authority to take any number of actions to avert or delay the purported automatic cancellation (see discussion under the heading The Alleged "Automatic" Cancellation, above), including simply not issuing the January 12 Declaration. The FCC's decision to issue the January 12 Declaration was not "automatic."

And, as already noted, but for the FCC's affirmative act in issuing the January 12 Declaration, all parties and the Courts would have proceeded, as they have throughout these proceedings, upon the assumption that the Licenses were not cancelled and remained the property of NextWave. Thus, in the real world it did require an "act" to give effect to the putative automatic cancellation, and that act violated the automatic stay.

Finally, it cannot be overemphasized that the FCC itself has repeatedly acknowledged that the automatic stay applies to the automatic cancellation provisions of its regulations, and that the automatic stay precludes automatic cancellation in the absence of an order of the Bankruptcy Court lifting the stay. No better evidence of this can be found than in the motion to lift the automatic stay which the FCC actually did make in late May 1999, and which was the subject of *NextWave V*. The Memorandum of Law in support of the FCC's Motion to Lift Automatic Stay, dated May 28, 1999, expressly acknowledged that the automatic stay "is currently in place pursuant to 11 U.S.C. § 362(a)" (p. 1) and continued:

> Accordingly, the FCC respectfully submits that "cause" exists under section 362(b)(1) for the Court to lift the automatic stay *so that* the regulations' *automatic cancellation* provisions *may take effect.*

Id. at 2; emphasis supplied. The concluding lines in the FCC's Memorandum state:

> For the reasons stated above, the Court should grant the FCC's motion to lift the automatic stay *so that the Licenses may cancel automatically.*

Id. at 4; emphasis supplied.[12]

The FCC was correct in May 1999—Section 362(a) does indeed require a court order lifting the automatic stay before the "automatic cancellation provisions may take effect . . . so that the Licenses may cancel automatically." No such order was granted in June 1999, and none was sought prior to the January 12 Declaration. Both the January 12 Declaration and the purported automatic retroactive cancellation of the Licenses are violations of the automatic stay.

---

[12] For other judicial acknowledgments by the FCC that a motion would be necessary to revoke or cancel NextWave's Licenses, *see, e.g.*:

- FCC Memorandum dated in May 1998 in support of motion to disqualify NextWave's counsel, at page 21, footnote 5, referring to "any motion by the FCC to lift the automatic stay for the purposes of revoking NextWave's C block licenses."
- Statements by FCC counsel in arguments before District Judge Parker on November 9, 1998: "During the pendency of the bankruptcy, the Bankruptcy Court and the automatic stay would hold the creditors at bay, including the Federal Communications Commission" (Tr. 5), and before this Court on November 12, 1998 "The regulations provide that upon failure to make the payments the license is automatically cancelled. *That hasn't (happened) in this case due to the automatic stay*" (Tr. 30, emphasis supplied).
- With respect to the F block licenses, statement by FCC counsel on May 26, 1999 before this Court "There is no trigger for the automatic cancellation that I understand to date with regard to the F-block licenses. As I understand it, they can comply with their payment obligations, they may well be in a position to reorganize around their F-block property" (Tr. 17).

The FCC's contention that its action was somehow shielded under the "governmental" exception to the automatic stay found in Section 362(b)(4) is not well-founded. Section 362(b)(4) provides:

> (b) The filing of a petition under . . . , does not operate as a stay—
>
> (4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

In interpreting this recently amended provision's exception of the automatic stay to a governmental exercise of "police and regulatory" power, case law developed under former Sections 362(b)(4) and (5) remains as viable guidance. *In re Mohawk Greenfield Motel Corp.*, 239 B.R. 1, 5 at n.6 (Bankr. D. Mass. 1999) citing 3 *Collier on Bankruptcy* ¶ 362.05[5][b] (16th Ed. 1999) and 2 Norton Bankruptcy Law and Practice 2d § 36.18 (1999).

The legislative history of Section 362(b)(4) is instructive as to the meaning of "police and legislative power." The House Report on the 1978 Reform Act states:

> paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to

> prevent or stop violation of fraud, environmental protection, consumer protection, safety or similar police or regulatory laws or attempting to fix damages for violation of such law, the action or proceeding is not stayed under the automatic stay.

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 343 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 51-52, reprinted in 1978 U.S.C.C.A.N. 5787, 5838, 5963, 6299. Representative Edwards' and Senator DeConcini's comments further clarify that Section 362(b)(4) must ". . . be given a narrow construction . . . and not . . . apply to actions by a governmental unit *to protect a pecuniary interest in property of the debtor or property of the estate.*" P. L. 95-598, 1978 U.S.C.C.A.N. 5787, 6444-45, 6513. (emphasis supplied)

Thus, the test to determine if this narrow exception applies is whether the governmental action is in pursuance of a pecuniary purpose or public policy. *In re Dunbar*, 235 B.R. 465, 471 (9th Cir. BAP 1999). Under the pecuniary purpose test, Section 362(b)(4) will not except the automatic stay where "government action relates 'primarily to the protection of the government's pecuniary interest in the debtor's property' . . . pursued 'solely to advance a pecuniary interest of the governmental unit.'" *Id.* citing *Universal Life Church, Inc.*, 128 F.3d 1294, 1297, 1299 (9th Cir. 1997), *cert. denied*, 524 U.S. 952, 118 S. Ct. 2367, 141 L. Ed. 2d 736 (1998). The public policy test, however, examines whether the governmental action is in furtherance of matters of public policy or merely the adjudication of private rights as between the government and the debtor. *In re Dunbar*, 235 B.R. at 471. ("Where the agency's action affects only the parties immediately

involved in the proceedings, it is exercising a judicial function and the debtor is entitled to the same protection from the automatic stay as if the proceeding were being conducted in a judicial forum."). *See also, In re Fugazy Express, Inc.*, 124 B.R. 426 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992) (retroactive cancellation of license by FCC not shielded by Section 362(b)(4) since action did not impact the health or safety of the public).

Section 362(b)(4) is not applicable here. The FCC's action is nothing other than a direct attempt to enforce its pecuniary interests. The stated premise of the FCC's action is the debtors' post-petition payment default. The FCC has attempted to exercise a self-help remedy for a purely financial default under the guise of a regulatory act. As noted by the Second Circuit in *Fugazy*, which also dealt with a purported FCC automatic retroactive cancellation:

> Nothing in the Code suggests that a party is entitled to engage in "self-help" in derogation of the automatic stay. *See In re Computer Communications, Inc.*, 824 F.2d 725, 731 (9th Cir. 1987) ("Judicial toleration of an alternative procedure of self-help and post hoc justification would defeat the purpose of the automatic stay").

In re Fugazy Express, Inc., 982 F.2d at 776.

The FCC acted as a creditor, and as discussed elsewhere in this decision, not in any regulatory capacity. Thus, the FCC's citations to *In re Gull Air, Inc., supra*, and *In re Yellow Cab Co-op. Ass'n, supra*, are unpersuasive because these cases consider issues pertaining

to regulatory non-use conditions, not vindication of the government's pecuniary interest.

II. *There can be no "default" for failure to make a payment precluded under the Bankruptcy Code*

At the core of this matter is the FCC's attempt to invoke a self-help remedy for the debtors' post-petition default on a pre-petition claim. The petition date is June 8, 1998. The January 12 Declaration recites "delinquencies" in payment more than 90 days from July 31, 1998, delinquencies clearly falling within the post-petition period and clearly arising from the January 3, 1997 Notes. "A claim is not rendered a post-petition claim simply by the fact that time for payment is triggered by an event that happens after filing of the petition." *In re Oxford Management, Inc.*, 4 F.3d 1329, 1335 n.7 (5th Cir. 1993).

Any notion of a legally cognizable "default" presupposes that the debtors could have lawfully made post-petition payments to the FCC in the first instance. As a matter of fundamental bankruptcy law, the debtors could not have made post-petition payments on account of this pre-petition claim absent an order of this Court, after notice and a hearing according due process to all affected parties. *See* 11 U.S.C. §§ 102(1) and 363.

Section 363(b)(1) authorizes the debtors, through application of Section 1107(a), to "use, sell, or lease, other than in the ordinary course of business, property of the estate," but only *after* notice and a hearing. "Section 363 is designed to strike [a] balance, allowing a business to continue its daily operations without excessive court or creditor oversight and protecting secured creditors and others from dissipation of the estate's

assets." *In re Lavigne*, 114 F.3d 379, 384 (2d Cir. 1997) citing *In re Roth American*, 975 F.2d 949, 952 (3d Cir. 1992) and quoting *In re H & S Transportation Co., Inc.*, 115 B.R. 592, 599 (M.D. Tenn. 1990). Section 1108 authorizes the debtors to operate the business, and therefore Section 363(c)(1) allows the debtors "unless the court orders otherwise, . . . [to] enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and [to] use property of the estate in the ordinary course of business without notice or a hearing." *In re Lavigne*, 114 F.3d 379, 384 at n.3; 11 U.S.C. § 363(c)(1).

The debtors' business (recognizing that it is still a start-up company) is "to build and operate [PCS] systems in geographical areas referred to as Basic Trading Areas ('BTAs'), and to provide wireless Internet access and voice services to a broad range of distribution partners." *First Amended Disclosure Statement*, dated July 27, 1999 at 5. Courts commonly apply the "horizontal" and "vertical" test to determine whether a transaction is "ordinary." *See In re Lavigne*, 114 F.3d at 384. But neither test is apposite here. In no way could it have been the ordinary course of NextWave's business to make payments on the $4.7 billion pre-petition claim of the FCC post-petition, even if that claim had not been challenged as a fraudulent conveyance in a hotly contested adversary proceeding. Even ordinary course creditors (such as inventory or parts suppliers, utilities and the like) cannot be paid their pre-petition claims without a court order. It is fundamental in a Chapter 11 case that the pre-petition claims of all creditors, whether coming due pre- or post-petition, get paid only by court order or in accordance with a court-confirmed

plan of reorganization. As aptly expressed in *In re H & S Transportation Co., Inc.*:

> Thus, the authorization in § 363 that the trustee may use property of the estate in the "ordinary course of business" without notice or a hearing cannot be construed to permit payments that frustrate the theory and philosophy of the Bankruptcy Code. *Pressman v. Bank of St. Louis* (*In re J.T.L., Inc.*), 36 B.R. 860, 862 (Bankr. E.D. Mo. 1984). *See Employee Transfer Corp. v. Grigsby* (*In re White Motor Corp.*), 831 F.2d 106 (6th Cir. 1987) (does not authorize conversion of prepetition debt to postpetition debt); *Lopa v. Selgar Realty Corp.* (*In re Selgar Realty Corp.*), 85 B.R. 235, 240 (Bankr. E.D.N.Y. 1988) (does not authorize sale of primary asset without notice and hearing); . . . *J.T.L.*, 36 B.R. at 862 (does not authorize postpetition payment of interest on prepetition note). Rather, the Court must interpret whether payments were made in the "ordinary course of business" with sensitivity to the Code's overriding policy of maximizing the value of the debtor's estate for the benefit of the creditors.

115 B.R. at 599. Actions which violate Section 363 are "void," *In re Lavigne*, 114 F.3d at 385 (purported cancellation of policy was void as an extraordinary disposition of property of the estate without notice or hearing). Any unauthorized post-petition payments to the FCC on account of its pre-petition claim would be avoidable at the instance of the debtors or other creditors as an unauthorized post-petition transfer under Section 549. *See* 11 U.S.C. § 549(a)(1)(B) ("the trustee may avoid a transfer of property of the estate . . . that occurs after

the commencement of the case; and . . . that is not authorized under this title or by the court").

It is senseless to speak of a "default" when, as a matter of bankruptcy law, the debtors had neither the authority nor the ability to make such payments absent notice and court approval. This is not a case where the FCC is entitled to post-petition payments on the Notes because it has shown that it needs adequate protection of its lien, *see* 11 U.S.C. §§ 361 and 362(d)(1), or that the value of its lien is in any way impaired. The FCC can point to no provision of the Bankruptcy Code that accords it a right to "timely" payment of postpetition delinquencies, such as a commercial landlord may claim under Section 365(d)(3). The FCC must, like other creditors, go through the plan process and have its claim administered under the Bankruptcy Code. The FCC could have applied to this Court to compel NextWave to make post-petition payments. But it did not do so.

Indeed, had the FCC ever made the debtors aware that it stood ready to enforce cancellation of the debtors' principal assets, the debtors could have applied to this Court under Section 363, or possibly even Section 105 under the necessity of payment doctrine, or the debtors could have attempted to arrange DIP financing to pay the amounts and sought approval under Section 364. But the FCC never did so.

The protection due the FCC under the Bankruptcy Code exists in the debtors' Plan.. The FCC will be paid in full, the putative "defaults" cured and nullified. No creditor can ask for better protection, in or out of

bankruptcy. The FCC cannot stand upon 97 C.F.R. § 1.2110(f)(4)(iv) to suborn Title 11:

> It is a fundamental principle of American law that legislative statutes take precedence over conflicting administrative regulations. *See, e.g., Caldera v. J.S. Alberici Constr. Co.*, 153 F.3d 1381, 1383 n.** (Fed. Cir. 1998) ("Statutes trump conflicting regulations"); *Wolf Creek Collieries v. Robinson*, 872 F.2d 1264, 1267 (6th Cir. 1989) ("statutory language . . . prevail[s] over inconsistent regulatory language"); *Pacific Gas and Elec. Co. v. United States*, 664 F.2d 1133, 1136 (9th Cir. 1981) ("a regulation which operates to create a rule out of harmony with the statute, is a mere nullity") (citing *Manhattan Gen. Equip. Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134, 56 S. Ct. 397, 80 L.Ed. 528 (1936)); *United States v. Gordon*, 638 F.2d 886, 888 (5th Cir. 1981) ("Whatever effect the agency regulation may have under other circumstances, it cannot supersede a statute applicable to those present here").

Furlow v. United States, 55 F. Supp. 2d 360, 364-65 (D. Md. 1999) (Treasury Department regulation impermissibly conflicting with 26 U.S.C. § 151).

There exists a host of protections, not only for the benefit of the debtors, but for the benefit of all constituent parties including the FCC, designed to ensure the rational, systematic and equitable reorganization of this estate. Self-help repossession by ambush is not one of them—it is repugnant to the very essence of the Bankruptcy Code.

III. *The January 12 Declaration of automatic cancellation is barred by the doctrines of equitable estoppel and waiver*

The January 12 Declaration and the FCC's position on this motion are confounded by the FCC's prior course of conduct and statements throughout these proceedings. Consider, for example, the following FCC quotations (emphasis supplied in each quotation):

- As early as July 13, 1998, the FCC argued: "The bankruptcy code also excepts from its automatic stay provisions 'the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.' 11 U.S.C. § 362(b)(4). *Under this provision, however, an agency's enforcement of a final regulatory order against a bankrupt is subject to the automatic stay, and the bankrupt retains its right to challenge any such order in the appropriate forum. See Board of Governors of the Federal Reserve Sys. v. MCorp Financial, Inc.*, 502 U.S. 32, 41, 44-45, 112 S. Ct. 459, 116 L.Ed.2d 358 (1991). Thus, despite the necessary dismissal of this adversary proceeding for lack of subject matter jurisdiction, *NextWave will still enjoy bankruptcy protection from collection of C block license payments pending reorganization of its business affairs. See NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992)."[13]

[13] Memorandum of Law in Support of FCC's Motion for Mandatory Withdrawal of the Bankruptcy Court Reference and Dismissal of NextWave's Adversary Proceeding (Adversary Doc. No. 5) (the "Dismissal Memorandum") at 18 n.5.

- "Because the FCC provided certain confidential information to WG & M, WG & M should also be disqualified from defending NextWave against *any motion by the FCC to lift the automatic stay for the purposes of revoking NextWave's C block licenses.*"[14]

- "Mr. Alter: The motion that is being made by the Federal Communications Commission is not by any means to bar this debtor from getting relief in bankruptcy. *During the pendency of the bankruptcy, the Bankruptcy Court and the automatic stay would hold the creditors at bay, including the Federal Communications Commission.*"[15]

- "[Mr. Alter]: The regulations provide that upon failure to make the payments the license is *automatically cancelled. That hasn't (happened) in this case due to the automatic stay. . . .*"[16]

- "Mr. Alter: . . . [T]hey [NextWave] are still quite a substantial company and [*the FCC has*] *not challenged their payment obligation under the F-block license. There is no trigger for the automatic cancellation that I understand to date with regard to the F-block licenses.* As I understand it, if they can comply with their payment

[14] Memorandum of Law in Support of FCC's Motion to Disqualify Weil Gotshal & Manges as NextWave's Counsel dated July 22, 1998, at 21-22 n.5.

[15] Transcript of Proceedings before the District Court, November 9, 1998, at 5.

[16] Transcript of proceedings before the Bankruptcy Court, November 12, 1998, at 30. The transcript erroneously attributed this quotation to the Court.

obligations, they may well be in a position to reorganize around their F-block property."[17]

- "[T]he radio spectrum licenses (*the "Licenses"*) issued by the FCC to the NextWave Debtors . . . *would be transferred directly to Nextel* or one or more of its subsidiaries identified by Nextel in its transfer application relating to the Licenses. . . ."[18]

- "To provide the consideration for the transfer of substantially all of *the assets of the NextWave Debtors, including the Licenses*, to Nextel. . . ."[19]

- "The approval of the transfer of *the NextWave Debtors' assets* to Nextel . . . will be submitted to and subject to the approval of the Bankruptcy Court."[20]

- "This letter responds to your letter of September 9, 1999, which requested additional information on the agreement reached between the FCC staff, the Department of Justice ("DOJ") and Nextel on the terms under which the government would support an alternative bankruptcy reorganization plan proposed by Nextel Communications, Inc. ("Nextel") for *the PCS licenses now held by NextWave* Personal Communications, Inc. ("NextWave").

[17] Transcript of proceedings before the Bankruptcy Court, May 26, 1999, at 17.

[18] Term Sheet for Comprehensive Settlement Agreement and Joint Plan of Reorganization ("Term Sheet") dated August 10, 1999, p. 1 at ¶ I(B).

[19] Term Sheet p. 4 at ¶ III(A).

[20] Term Sheet p. 6 at ¶ III(D).

* * * * * *

As reflected in the term sheet, if the bankruptcy court approves the Nextel plan, then the FCC's General Counsel agreed to recommend that the full Commission grant a waiver of the C and F block eligibility rules to allow a transfer of *NextWave's licenses* to Nextel pursuant to a court-approved reorganization plan."[21]

- "The Federal Communications Commission ("FCC") respectfully submits this memorandum of law in support of its motion pursuant to 11 U.S.C. § 362(d)(1) ("section 362(d)(1)") and Rule 4001 of the Federal Rules of Bankruptcy Procedure for an order lifting *the automatic stay* in the above captioned bankruptcy case, *which is currently in place* pursuant to 11 U.S.C. § 362(a).

* * * * * *

Accordingly, the FCC respectfully submits that "cause" exists under section 362(d)(1) for the Court to *lift the automatic stay so that the regulations' automatic cancellation provisions may take effect.*"[22]

Aside from these and many other similar oral and written statements by the FCC, the FCC's entire

[21] Letter dated September 27, 1999 from the FCC Chairman to Representative Tom Bliley.

[22] May 28, 1999 Memorandum of Law in Support of FCC's Motion to Lift Automatic Stay at 1-2.

course of conduct (*i.e.*, what the government did, and did not do) right up to the January 12 Declaration is consistent with only one set of assumptions: NextWave "would enjoy bankruptcy protection from collection of C block license payments pending reorganization of its business affairs"; the automatic stay would "hold the creditors at bay, including the [FCC]"; the automatic stay, "currently in place," precluded the automatic cancellation of NextWave's licenses without prior application to the Bankruptcy Court; NextWave continues to hold the licenses as part of its assets which the FCC negotiated to transfer to Nextel under a "Term Sheet for Comprehensive Settlement Agreement and Joint Plan of Reorganization."

All parties in interest, *including the FCC*, conducted themselves in a way which clearly demonstrated reliance upon these assumptions. Consider the following:

- Nearly $10 million has been expended by lawyers and other professionals for the parties (not including the FCC).
- NextWave engaged in an entire trial of and subsequent appeals in the Adversary Proceeding (including to the Second Circuit).
- Approval of the Disclosure Statement, solicitation of creditors, the original scheduling of confirmation and its stay by the Second Circuit took place.
- DIP Lenders have extended $35 million credit secured by assets including the F Licenses relying upon prior representations and conduct of the FCC.

- The Official Creditor's Committee, which represents more than $500 million of creditors "relied extensively upon those representations [by the FCC] in conducting itself in these cases. The Committee represents that had it any inkling that the FCC viewed the licenses as subject to automatic cancellation for non-payment, it would certainly have sought judicial determination of this issue before the first payment was past due."[23]
- "Had the Debtors and their creditors known that they would forfeit almost $500 million in License down payments and the Licenses, thus wiping out any chance for recovery on the hundreds of millions in claims, by failing to make interest payments on pre-petition debt in bankruptcy, they would have made every effort to come up with the money while the reorganization effort continued".[24]
- Extensive litigation with Nextel, some of which remains pending, resulted from the Term Sheet between Nextel and the FCC looking to the transfer of NextWave's Licenses to Nextel.

While courts have expressed reluctance to apply the doctrine of equitable estoppel to government in situa-

---

[23] Statement of the Official Creditor's Committee in Support of, and Joinder in, Order to Show Cause Against FCC for Enforcement of the Automatic Stay with Respect to the Debtor's C and F Block Licenses, 4 at ¶ 17.

[24] Debtor's Reply Brief in Support of Order to Show Cause Against the FCC for Enforcement of the Automatic Stay with Respect to the Debtors' C and F Block Licenses ("Debtor's Reply Brief") at 27.

tions where government is acting in its sovereign capacity, the same rationale does not hold where, as here, government is acting in a commercial capacity. For example, in *Federal Deposit Insurance Corp. v. Sarandon*, Case No. 91 Civ. 5109, 1992 WL 36132 (S.D.N.Y. Feb. 19, 1992), the court made this distinction clear:

> The rule of no estoppel against the government, as articulated in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384, 68 S. Ct. 1, 92 L.Ed. 10 (1947), may be better described as a rule of no estoppel against the government when the government acts in its sovereign capacity rather than in a commercial capacity. When the FDIC sues to collect on a promissory note it is acting in a commercial and not in a sovereign capacity, and should be as vulnerable as any other litigant to principles of estoppel when it acts in a fashion that prejudices private citizens.

Similarly, the court in *Federal Deposit Insurance Corp. v. Harrison*, 735 F.2d 408 (11th Cir. 1984), found that the FDIC was acting as a commercial creditor in its efforts to collect payment on certain notes and stated:

> Proprietary governmental functions include essentially commercial transactions involving the purchase or sale of goods and services and other activities for the commercial benefit of a particular government agency. Whereas in its sovereign role, the government carries out unique governmental functions for the benefit of the whole public, in its proprietary capacity the government's activities are analogous to those of a private concern.

As stated by the Supreme Court in *Dickerson v. Colgrove*, 100 U.S. 578, 580, 25 L.Ed. 618 (1879):

> The estoppel here relied upon is known as an equitable or estoppel in pais. The law upon the subject is well settled. The vital principle is, that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied to promote the ends of justice. . . . It accomplishes that which ought to be done between man and man. . . .

The FCC argues that estoppel may apply to the government "only in those limited cases where the party can establish both that the Government made a misrepresentation upon which the party reasonably and detrimentally relied and that the Government engaged in affirmative misconduct," citing *Drozd v. I.N.S.*, 155 F.3d 81, 90 (2d Cir. 1998) and *City of New York v. Shalala*, 34 F.3d 1161 (2d Cir. 1994). However, these cases are readily distinguishable in that the plaintiffs there sought to estop government agencies from acting in their regulatory capacity. Where the government acts in a commercial capacity, as in the instant case, equitable estoppel is appropriate with or without findings of misrepresentation.

Indeed, the notion of "misconduct" is beside the point. What is important here is that the FCC acted one way for more than a year, and parties spent or loaned millions assuming that it meant what it said. Reliance was both reasonable and inevitable. Equitable

estoppel will operate to prevent irrevocable harm from such a radical change of position as the January 12 Declaration.

As to waiver, "bankruptcy courts as courts of equity, should look with disfavor on contract forfeitures, especially if forfeiture would imperil a debtor's reorganization efforts. There is a tendency to overlook a failure to comply strictly with the terms of a contract when the parties by their conduct, have tolerated deviations in performance." *See In re Photo Promotion Assocs., Inc.*, 45 B.R. 878, 882 (S.D.N.Y. 1985).

The law recognizes that the government, like any other contracting party, must give reasonable notice of any new compliance schedule if it chooses to unilaterally impose such a schedule. *See, e.g., Bailey Specialized Bldgs., Inc. v. United States*, 186 Ct. Cl. 71, 404 F.2d 355, 359 (1968).[25] Such a waiver by one with authority will estop the government and the requirement cannot be suddenly revived to the prejudice of a party who has changed his position in reliance on the supposed suspension. *Gresham & Co. v. United States*, 200 Ct. Cl. 97, 470 F.2d 542, 555 (1972). *See also Miller Elevator Co., Inc. v. United States*, 30 Fed. Cl. 662, 688 (1994).

---

[25] *See also* Glen T. Carberry & Phillip M. Johnstone, *Waiver of the Government's Right to Terminate For Default In Government Defense Contracts*, 17 PUB. CONT. L. J. 470, 478-81 (1988). In addition, implied waiver can occur when there is (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on failure to terminate and continued performance by him under the contract, with the government's knowledge and express or implied consent. *See DeVito v. United States*, 188 Ct. Cl. 979, 413 F.2d 1147, 1154 (1969).

In recognizing that waivers are applicable against the government, the D.C. Circuit has held that where, as here

> a government official has authority to waive the regulations allegedly violated [pursuant to its discretionary authority], "we look instead to the standards of waiver that would govern between private parties." . . . Thus when, in the course of making an agreement, an official with power to waive a regulation that would bar the agreement acts in a way that signals to a private party an objective intent to waive the regulation, and the private party relies on that behavior, the government official is estopped from voiding the agreement on the basis of the regulation.

Cinciarelli v. Reagan, 729 F.2d 801, 807-08 (D.C. Cir. 1984) (emphasis added). *Branch Banking & Trust Co. v. United States*, 120 Ct. Cl. 72, 98 F. Supp. 757, 766, *cert. denied*, 342 U.S. 893, 72 S.Ct. 200, 96 L.Ed. 669 (1951).

The FCC has the power and discretion to waive timely payment. The FCC acted in a way which said expressly and by implication that payments were suspended during NextWave's Chapter 11. NextWave and other parties acted in reliance.

It has been held that the FCC must consider the impact of its actions upon innocent creditors in assessing public interest with respect to FCC licenses. *Second Thursday Corp.*, 22 F.C.C.2d 515, 516 (1970); *LaRose v. FCC*, 494 F.2d 1145, 1146 & n.6 (D.C. Cir. 1974) ("[a]dministrative agencies have been required to consider other federal policies, not unique to their particular

area of administrative expertise, when fulfilling their mandate to assure that their regulatees operate in the public interest"). In the present case, a decision to declare that the debtors' licenses were automatically cancelled one year ago, in the face of prospective full payment and immediate deployment, arbitrarily leaves the creditors and shareholders of these estates—representing $1.047 billion of claims—with little if any chance for recovery.

On the undisputed facts, the FCC has waived its "timely payment" requirement. Ultimately, NextWave must comply with the "payment in full" requirement, or the Licenses will be cancelled. But the debtors must be granted due process and their day in court under the Bankruptcy Code and a fair opportunity to pay their debt to the FCC in a confirmed Plan.

IV. *No regulatory purpose countenanced by the governing statute is served by the "timely payment" requirement*

The Court of Appeals has held that there is a "regulatory" aspect in the FCC's "payment in full" requirement. But no such aspect can be inferred with respect to the FCC's "timely payment" requirement. No rational explanation has been offered to show that timeliness has any objective other than pure debtor-creditor economics.[26]

---

[26] If the "timely payment" requirement served a *bona fide* regulatory objective, one must wonder what was the impact on that objective of the FCC's March and April 1997 orders indefinitely suspending all payments for C and F block licensees, the FCC's numerous regulations, orders, notices and instructions rescheduling and repeatedly changing payment deadlines, and the FCC's repeated grant of waivers of payment defaults by other spectrum licensees. And how does that impact differ from the impact of the NextWave delay in payment?

What has been completely overlooked in the FCC's regulatory aspect contentions is that they conflict with the spirit and the letter of the agency's governing statute. The FCA does not mandate that the FCC should seek to extract maximum consideration for PCS licenses. To the contrary, Congress has specified as one of four basic objectives of spectrum auctions "(C) recovery for the public of *a portion of* the value of the public spectrum resource." 47 U.S.C. § 309(j)(3)(C). The statute goes further and expressly precludes the FCC from basing regulatory determinations on revenue considerations. FCA § 309(j)(7)(A) and (B), under the heading "Consideration of revenues in public interest determinations," provides as follows:

(A) Consideration prohibited

> In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission *may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues* from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to *paragraph (4)(A)* of this subsection, the Commission *may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues* from the use of a system of competitive bidding under this subsection.

47 U.S.C. § 309(j)(7)(A), (B); emphasis supplied.[27]

Paragraph (7)(A) applies to the FCC in its function of assigning or allocating spectrum, and it prohibits the FCC from exercising that regulatory function based on "the expectation of Federal revenues."

Paragraph (7)(B) governs the FCC in prescribing regulations pursuant to paragraph (4)(A). Paragraph (4)(A) provides as follows:

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission *shall—*

(A) consider *alternative* payment *schedules* and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, *or other schedules* or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

47 U.S.C. § 309(j)(9)(A); emphasis supplied.

---

[27] The words "public interest," "convenience" and "necessity" obviously refer to the FCC's regulatory jurisdiction.

Thus, Congress has ordered the FCC in Section 309(j)(4)(A) to "consider alternative payment schedules" to accomplish the legislative objectives, while in Section 309(j)(7)(B) Congress specifically prohibited the FCC from prescribing such regulations having a regulatory purpose "solely or predominantly on the expectation of Federal revenues." Certainly the statute contemplates that the FCC prescribe regulations respecting the installment payments called for by the legislation. But Congress has made clear that the expectation of revenue, *i.e.*, debtor-creditor economics, may not inform the FCC's regulatory equation. Precisely the same issue has arisen in the context of Section 362(b)(4) of the Bankruptcy Code, and the courts have uniformly drawn the distinction between administrative proceedings or actions that are regulatory in nature and those that are purely economic. *See* discussion under point I.D, above.

The FCC is bound by the statute from which it derives its jurisdiction. "It is a fundamental principle of American law that legislative statutes take precedence over conflicting administrative regulations." *Furlow v. U.S.*, 55 F. Supp. 2d 360, 364 (D. Md. 1999); *Caldera v. J.S. Alberici Const. Co.*, 153 F.3d 1381, 1383 (Fed. Cir. 1998) ("Statutes trump conflicting regulations"); *Wolf Creek Collieries v. Robinson*, 872 F.2d 1264, 1267 (6th Cir. 1989) ("statutory language . . . prevail[s] over inconsistent regulatory language"); *Bukala v. U.S.*, 854 F.2d 201, 203 (7th Cir. 1988) ("an agency's interpretation of a statute . . . cannot supersede statutory language"); *Johnson v. Heckler*, 769 F.2d 1202, 1212 (7th Cir. 1985); *Pacific and Gas Elec. Co. v. U.S.*, 664 F.2d 1133, 1136 (9th Cir. 1981) ("a regulation which operates to create a rule out of harmony with the

statute is a mere nullity") (citing *Manhattan Gen. Equip. Co. v. C.I.R.*, 297 U.S. 129, 134, 56 S. Ct. 397, 80 L.Ed. 528 (1936); *U.S. v. Gordon*, 638 F.2d 886, 888 (5th Cir. 1981)) ("whatever effect the agency regulation may have under other circumstances, it cannot supersede a statute applicable to those present here"). Nor can the FCC's regulations override the Bankruptcy Code. *U.S. v. Shumway*, 199 F.3d 1093, 1104-05 (9th Cir. 1999); *Freeman v. City of Mobile*, 193 F.3d 1179 (11th Cir. 1999) (agency cannot amend or supplant an act of the legislature).

Finally, one must ask whether there is any regulatory concern of such consequence that it should override the protections and policy considerations that lie at the very core of the Bankruptcy Code, or bar the jurisdiction of the Bankruptcy Court from enforcing the Code. What regulatory principle or public interest does the FCC invoke to outweigh the investment in these debtors of over $1 billion in debt and equity? What public policy is served by an act of the United States Government which violates basic notions of equity, due process and the Bankruptcy Code? What purpose is served by the FCC's relinquishment of over $4.7 billion for the C Licenses? How does the January 12 Declaration coexist with 47 U.S.C. § 309(j)(3)(A) looking to "rapid deployment" of spectrum "without administrative or judicial delays," or 47 U.S.C. § 309(j)(7)(A) and (B) prohibiting the FCC from exercising its regulatory discretion "on the expectation of Federal revenues?"

The FCC cannot, either by its regulations or its interpretation of its regulations, supervene either the Federal Communications Act or the Federal Bankruptcy Code. Where those regulations or the agency's

interpretation thereof conflict with either the FCA or the Bankruptcy Code, the will of Congress as expressed in the statutes must prevail.

V. *The Circuit Court Decision does not address the issues presented on this motion*

Little need be said of the FCC's contention that the instant motion is governed by the Second Circuit Decision. Ultimately, it will be for the Court of Appeals to resolve this controversy, if the parties do not sooner settle it among themselves. In the meantime, the matter has been remanded to the Bankruptcy Court, and it is the responsibility of this Court to address the issues raised by this motion for review by the District and Circuit Courts.

The Court of Appeals rulings in respect of *NextWave I*, concerning subject matter jurisdiction, and *NextWave II*, concerning fraudulent conveyance analysis, are the law of the case in these proceedings. But they do not touch upon the issues now before this Court, which arise from a subsequent event, the January 12 Declaration. Indeed, in remanding to the Bankruptcy Court, the Court of Appeals specifically referred to the possibility that the FCC might, in the future, seek to revoke the Licenses (*see* footnote 4, above).

The FCC relies upon the statement in the Circuit Court Decision that "the FCC made 'full and timely payment of the winning bid' a regulatory condition for obtaining and retaining spectrum license" (200 F.3d at 52). However, the very next sentence states: "This 'payment in full' requirement has a regulatory purpose . . ." (*id.*), and the entire balance of the Circuit Court Decision bearing on the question of regulatory purpose

and subject matter jurisdiction is concerned solely with the "payment in full" requirement, which was the only matter before the Court. The Court of Appeals did not consider the question whether the "timely payment" requirement was invested with a regulatory purpose, because the FCC had never asserted any legal position based upon NextWave's failure to make post-petition payments on its pre-petition claims.

Conclusion

For the foregoing reasons, the debtors' motion is granted. Counsel for NextWave will prepare forthwith an order consistent with this decision, fax it to counsel for the FCC for approval as to form (without prejudice to appeal) and submit it to this Court.

In accordance with the Court of Appeals' order of January 24, 2000, ruling upon the FCC's "Emergency Motion for a Stay of Bankruptcy Court Proceedings and Leave to File a Mandamus Petition," confirmation of any Plan of reorganization is stayed pending further order of the Court of Appeals. This Court admonishes the parties to cooperate in seeking expedited review on appeal in order that these Chapter 11 cases may be brought to a conclusion without unnecessary prejudice to the debtors' estates and the public interest entailed in further delay.

APPENDIX A

The Alleged "Default"

The FCC maintains that the debtors' Licenses automatically and retroactively ceased to exist at some point in late 1998 or January 1999 as a result of a "default" by NextWave citing 47 C.F.R. § 1.2110(f)(4)(iv).[28] Yet the FCC cannot answer the most basic question as to the date of the default, the amount of the default, or the documents which might have apprised the debtors of the then impending default and forfeiture. As shown below, the answers to these questions are completely unclear.

Notice of the Alleged Default

The first issue, reading from 47 C.F.R. § 1.2110(f)(4)(iv), is whether the debtors were ever given any notice of a default, because some form of notice of default, at the very least a declaration, is required by the phrase "will be declared in default."

At argument the FCC was extensively questioned as to whether any notice of default was given. Conceding that no notice was given to the debtors other than the January 12 Declaration, the FCC instead argued that it

---

[28] Subsection (iv) provides:

> Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period, if such a grace period is available, *will be declared in default*, its license will automatically cancel, and will be subject to debt collection procedures. (emphasis supplied).

had published policy statements in its record which constructively gave notice of default and automatic cancellation under 47 C.F.R. § 1.2110(f)(4)(iv). (These published statements are addressed below.)

Moreover, the FCC also maintained that it was not required to specifically notify the debtor of the default, that under the regulation default occurred automatically despite the language "will be declared in default," and that it was incumbent on the debtors, before a "default" occurred, to seek an extension or waiver before any discretion of the FCC could be invoked. The FCC did, however, give other parties notice of their payment defaults.[29] The FCC did not do so in this case. Its argument that the January 12 Declaration served as notice of default is little better than a post hoc rationalization for the failure to provide the same notice to the debtor it extended to other licensees. The fact is that the FCC simply ignored 47 C.F.R. § 1.2110(f)(4)(iv)'s direction that a default "will be declared."

---

[29] *See e.g., In Re Roberts-Roberts & Assocs.*, 12 F.C.C.R. 1825, 1997 WL 43121 (Feb. 4, 1997) (granting waiver of downpayment rules for incorrect payment after notice of delinquency issued); *In Re Southern Communications Systems, Inc.*, 12 F.C.C.R. 1532, 1997 WL 43127 (Feb. 4, 1997) (waiver of late payment default where payment made one day late and upon notice of delinquency); *In Re Longstreet Communications Int'l., Inc.*, 12 F.C.C.R. 1549, 1997 WL 43114 (Feb. 4, 1997) (waiver of late payment default where payment made nine days late and upon notice of delinquency); *In Re RFW, Inc.*, 12 F.C.C.R. 1536, 1997 WL 43097 (1997) (waiver of late payment default where payment made six days late and upon notice of delinquency); *In Re Wireless Telecommunications Co.*, 12 F.C.C.R. 1544 (Feb. 4, 1997) (waiver of late payment default where payment made two days late and upon notice of delinquency).

The Date of the Alleged Default

The FCC is unable to specify a date for the debtors' alleged default. The FCC's position in its objection to confirmation and in its brief is that a default occurred sometime (variously) in late 1998 or January 1999, while the January 12 Declaration only recites a delinquency more than 90 days after July 31, 1998. The FCC relies on the provisions of the installment payment "Restructuring Orders" to support its vague assertion of a default date at some point in January 1999.

To appreciate these Restructuring Orders, some history of the of regulatory sequence is necessary. On March 31, 1997, the FCC issued an order which suspended the installment payment obligations of C block licensees "until further notice," although interest continued to accrue during the suspension. *In the Matter of Installment Payments for PCS Licenses*, 12 F.C.C.R. 17325, 1997 WL 144207 (1997). A corresponding suspension was issued for F block licensees on April 28, 1997.

The suspension was lifted in a September 25, 1997 "restructuring" order, *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 12 F.C.C.R. 16436, 1997 WL 643811 (Sept. 25, 1997) (the "First Restructuring Order"), and modified in two subsequent orders, *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 13 F.C.C.R. 8345, 1998 WL 130176 (March 23, 1998) (the "Second Restructuring Order"), and *In the Matter of Amendment of the Commission's Rules Regarding In-*

stallment Payment Financing for Personal Communications Services (PCS) Licensees, 14 F.C.C.R. 6571, 1999 WL 183822 (March 31, 1999) (the "Third Restructuring Order", collectively the three are referred to as the "Restructuring Orders"). The First Restructuring Order instituted the resumption of installment payments for C and F block licensees as of March 31, 1998 and instituted an automatic 60-day grace period (payment date of May 30, 1998). 12 F.C.C.R. 16436 at ¶ 25. The First Restructuring Order further set out three options to resumption of payments originally due for C block licenses, with an election to be made by June 8, 1998. The Second Restructuring Order modified the options available to C block licensees, changed the automatic 60-day grace period to a 90-day period, and reset the payment resumption date from March 31, 1998 to a date 90 days after publication of the Second Restructuring Order in the Federal Register, with a 5% late payment fee due for amounts paid within this period. 13 F.C.C.R. 8345 at ¶¶ 6, 15. The Third Restructuring Order did not alter these due dates.

In a confusing series of rulings, the FCC delayed the issuance of a final installment payment resumption date, finally setting it for July 31, 1998. 13 F.C.C.R. 7413, 1998 WL 180790 (April 17, 1998) ("Installment payments for broadband PCS C and F block licensees will resume on July 31, 1998. On that date, licensees are required to pay accrued interest from April 1, 1998, through and including July 31, 1998, plus one-eighth of their Suspension Interest. Payments received after July 31, 1998, but on or before October 29, 1998, must include a late payment fee equal to 5% of the amount that was due on July 31, 1998.").

In the meantime, amendments to 47 C.F.R. § 1.2110 became effective on March 16, 1998 which both modified and incorporated some of the terms of the First and Second Restructuring Orders. However, the FCC only released an interpretive guidance document some six months later in the September 18, 1998 *Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules*, 13 F.C.C.R. 18213, 1998 WL 639381 (September 18, 1998) (the "Guidance Notice"). The Guidance Notice instructs:

> The Commission recently amended 47 C.F.R. § 1.2110 to provide that licensees that do not make an installment payment on or before a due date are automatically granted a 90 day grace period ("non-delinquency period") and assessed a late fee equal to 5 percent of the missed installment payment ("late fee"). *If remittance of the missed installment payment and the 5 percent late fee is not made on or before expiration of the non-delinquency period, a second 90 day period ("grace period") is automatically granted and an additional late fee equal to 10 percent of the missed installment payment is assessed.* Licensees are not required to make an application to the Commission to receive the non-delinquency period or the grace period. Furthermore, licensees are not required to remit the 5 percent late fee prior to the expiration of the non-delinquency period to be eligible for the grace period. Late fees accrue on the first business day after a missed installment payment and upon the expiration of the non-delinquency period.
>
> Specifically, under the revised rule, a licensee must pay the missed installment payment, the 5 percent

late fee, the 10 percent late fee (if applicable) and any lender advances the licensee may be obligated to pay (including but not limited to Uniform Commercial Code filing fees and attorney fees for debt collection). This payment must be made in full, in one payment, before the expiration of the nondelinquency period or grace period. Payments made during a nondelinquency period or a grace period shall be applied in the following order of priorities: (i) lender advances (ii) late fees (iii) interest payable and (iv) principal owed.

Any licensee that becomes more than one-hundred eighty (180) days delinquent on an installment payment shall be in default, and the license shall automatically cancel without further action by the Commission. In that event, the debt shall be transferred to the Department of Treasury for collection subject to the Debt Collection Improvement Act of 1996.

Payment due dates for missed installment payments and accompanying late fee(s) are independent of the regular installment payment schedules. Licensees should be aware that the late payment provisions are calculated on a 90 calendar day basis, while installment payments are based on a quarterly payment schedule. Quarterly payments may cover up to 92 calendar days, depending upon the month in which the payment is due. In many instances, missed installment payments and accompanying late fee(s) may be due before the next quarterly installment payment. Payments of missed installment payments and accompanying late fee(s) must be made simultaneously and in a timely manner. Partial payments will not be sufficient to avoid default. (emphasis supplied)

According to the Guidance Notice, the operative grace period for installment payments should be 180 days from the modified resumption date (July 31, 1998), or January 28, 1999. However, the Guidance Notice was not released until well after the April 17 revision of the resumption date to July 31, 1998. Assuming that a licensee would have found this public notice, any licensee in September of 1998 would have faced interpretive guidance relating to a potential default date of July 31, 1998, established five months earlier on April 17 and extending the previous due date of March 31 which itself was established on March 23 in the Second Restructuring Order, only to find himself within a grace period extending until October 28 (then only a month or so away), which was established by implication on March 16 in the amendments to 47 C.F.R. § 1.2110 and could only be determined with reference to the April 17 order, with a possible second grace period assessing a doubled penalty rate to run for an additional 90 days.

Of course, the foregoing analysis may not accord with the FCC's contemporaneous or post hoc interpretations of its regulations, or indeed possibly some other regulations this Court has not found, even after its own diligent computer search through the often vague and conflicting flotsam of FCC releases.

It certainly does not accord with the representations made to this Court by the FCC. The FCC in its memorandum claims October 31, 1998 as the deadline, citing to *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment for Personal Communications Services (PCS) Licenses,*

Order on Consideration of Second Report and Order, 13 F.C.C.R. 8345 at ¶¶ 15, 21-30, 1998 WL 130176 (March 24, 1998). Yet, this date is completely inconsistent, from this Court's reading, with the later-issued Guidance Notice. The only thing that is clear is that, whatever the putative default date was, it was a moving target. As daunting as it has been for this Court to attempt to reconstruct this sequence well after the fact, it would have been beyond perplexing for a licensee at the time to fix any reasonable notion of what obligation was due when.

Not surprisingly, in this contested matter the FCC has been unable to articulate any date upon which the debtor's installment obligations were due, even noting that their calculation of January 1999 was in part informed by the 60-day extension provision of Bankruptcy Code Section 108. Subtracting 60 days from January 1999 results in some date in November 1998, for which no support exists in the regulations. Add to this the fact that the debtor filed its petition in June of 1998, in the midst of miasma of conflicting, shifting deadline amendments, and there is little surprise that FCC counsel at the hearing was able to identify a date certain for a default.

Even assuming, say, that January 28, 1999 were the correct date for the expiration of any applicable grace period, it does not follow that a "default" occurred. Payment obligations were suspended until July 31, 1998, but the debtors filed their petition on June 8, 1998. Thus the suspension was in effect when the debtor commenced this case. No obligation was then due. Under the grace period regulations, no obligation would have been due, this Court assumes in the absence

of any other cogent explanation, until January 28, 1999. The FCC's claimed default date calculation, which falls sometime in either of October or November 1998 excluding any effect of Section 108, is utterly inconsistent with its guidance documents which would have putatively granted grace periods until January 28, 1999. If that is indeed the FCC's "rough" calculation, the debtors cannot have been in default when the FCC claims it to have been. The debtors' obligations on the Notes were incurred as of January 3, 1997 (but executed on February 19, 1997). The March 31, 1997 suspension order suspended any installment payment obligations and they were not resumed until July 31, 1998 (at the earliest, although interest continued to accrue). Thus, the putative default amounts, if indeed they can be calculated, were entirely post-petition. The legal effect of any putative default or automatic cancellation issuing in the post-petition period is discussed in the main body of this decision.

The Amount of the Alleged Default

What was the amount of the debtor's alleged default in late 1998 or January 1999? There is no answer.

The only documentation of what might have been due, contained in a supplemental submission by the FCC, is a statement to NextWave dated May 26, 1998 of total interest due of $2,474,901.66 for payments comprising five payments due from 4/30/97 through 3/31/98. How these payments could have been "due" as of May 26, 1998 while the various suspensions and grace periods were in effect is not at all clear, especially in light of the April 17, 1998 extension of the resumption date to July 31, 1998.

The Restructuring Orders, the March 16, 1998 amendment to 47 C.F.R. § 1.2110 and the Guidance Notice do give some guidance as to method of calculation, but the guidance is hopelessly complex and confusing. *See* First Restructuring Order ¶¶ 25-27, (requiring "all payments due and owing on and after March 31, 1998 be made in accordance with the terms of the licensee's Note, associated Security Agreement, and the Commission orders and regulations," with all interest accrued over the suspension period becoming due and payable over a two-year period in one-eighth of the amount of suspension period interest payable with each regular installment payment until paid). As to regular installment payments, the First Restructuring order provides:

> We conclude that it could place a significant burden on licensees to require payment of the entire amount of the Suspension Interest on March 31, 1998. We therefore require that broadband PCS C and F block licensees submit one-eighth of the Suspension Interest on March 31, 1998, and one-eighth of the Suspension Interest with each regular installment payment made thereafter until the Suspension Interest is paid in full. After March 31, 1998, payment dues dates will conform to those indicated in the Note(s) executed by the licensees. While the first regular installment payment next made after March 31, 1998 will be pro-rated to account for the resumption of payments on March 31, 1998, all regular installment payments thereafter will be in the amounts shown on the amortization schedule attached to and made a part of each Note, as amended, plus the applicable payments of Suspension Interest. For example, for those licensees granted in September, 1996 whose regular installments occur on March 31, June 30, September 30, and December 31 of each year, the next regular payment due after March 31, 1998, will be due on June 30, 1998, and will include the amount of interest accrued from April 1, 1998, through and including June 30, 1998, plus one-eighth of the Suspension Interest. The next regular payment will be due on September 30, 1998, and will be due in the amount shown on the amortization schedule attached to the Note (i.e., interest from July 1, 1998, through and including September 30, 1998), plus one-eighth of the Suspension Interest. Regular payments will continue on each and every December 31, March 31, June 30, and September 30 thereafter until the Note is paid in full. For these licensees, the payment due on December 31, 1999, will be the last payment due that includes any amortized Suspension Interest. All payments after that date will continue in accordance with the terms of the amortization schedule attached to the Note executed by the licensee.

Id. at ¶ 27. The Second Restructuring Order made the following changes:

> . . . we will extend to 90 days the automatic 60-day non-delinquency period applicable to payments due on the payment resumption date. As mentioned above, the Commission's rules allow a 90-day non-delinquency period for all other installment payments. Although we stated in the Second Report and Order that a shorter non-delinquency period was justified in light of the one-year payment suspension, we now believe that it is preferable to make

the length of that non-delinquency period consistent with our rule for all other payments. . . . Consistent with our rule for all other payments, payments made within this 90-day non-delinquency period will be assessed the 5 percent late payment fee that we recently adopted. . . . Therefore, there will be no subsequent automatic grace period for licensees that fail to make payment within the 90-day non-delinquency period. Subsequent payments, due after the initial resumption payment, will be subject to the rules adopted in the Part I Third Report and Order.[30]

27. Under this plan, the Suspension Period (as defined in the Second Report and Order) will still end on March 31, 1998. All interest accrued from the date of license grant through March 31, 1998, (i.e., Suspension Interest) will continue to be payable over eight equal payments. Interest accrued from April 1, 1998, through the payment resumption date will be due on the payment resumption date, in addition to one-eighth of the Suspension Interest. . . . In addition, we instruct the Bureau to modify the payment schedule so that all C and F block installment payments will be due on a quarterly basis, beginning on the payment resumption date.

Second Restructuring Order at ¶¶ 25-27. The March 16 amendments to 47 C.F.R. § 1.2110, as articulated in the Guidance Notice, issued only well after the extended resumption date of July 31, 1998, once again changed the grace periods along with any applicable charges:

---

[30] This refers to the March 16, 1998 amendments to 47 C.F.R. § 1.2110, 63 FR 2315.

The Commission recently amended 47 C.F.R. § 1.2110 to provide that licensees that do not make an installment payment on or before a due date are automatically granted a 90 day grace period ("non-delinquency period") and assessed a late fee equal to 5 percent of the missed installment payment ("late fee"). If remittance of the missed installment payment and the 5 percent late fee is not made on or before expiration of the non-delinquency period, a second 90 day period ("grace period") is automatically granted and an additional late fee equal to 10 percent of the missed installment payment is assessed. Licensees are not required to make an application to the Commission to receive the non-delinquency period or the grace period. Furthermore, licensees are not required to remit the 5 percent late fee prior to the expiration of the non-delinquency period to be eligible for the grace period. Late fees accrue on the first business day after a missed installment payment and upon the expiration of the non-delinquency period.

Specifically, under the revised rule, a licensee must pay the missed installment payment, the 5 percent late fee, the 10 percent late fee (if applicable) and any lender advances the licensee may be obligated to pay (including but not limited to Uniform Commercial Code filing fees and attorney fees for debt collection). This payment must be made in full, in one payment, before the expiration of the non-delinquency period or grace period. Payments made during a non-delinquency period or a grace period shall be applied in the following order of priorities: (i) lender advances (ii) late fees (iii) interest payable and (iv) principal owed.

Guidance Notice, *supra*. Moreover, the Guidance Notice stated:

> Licensees should be aware that the late payment provisions are calculated on a 90 calendar day basis, while installment payments are based on a quarterly payment schedule. Quarterly payments may cover up to 92 calendar days, depending upon the month in which the payment is due. In many instances, missed installment payments and accompanying late fees) may be due before the next quarterly installment payment.

Id. In other words, although suspension period interest was to be paid along with regular installment payments (when the obligation resumed, but upon which date is not altogether clear), *see* the quoted provisions of the Restructuring Orders, *supra*, the Guidance Notice appears to say that some payments may have been due before others.

Reading through this sequence of FCC pronouncements, one is unable to divine how to calculate what payment would have been due, even assuming that a default date could be determined, which is itself problematic. It is also unclear whether the statement in the Second Reconsideration Order (dated March 24, 1998) that "there will be no subsequent automatic grace period for licensees that fail to make payment within the 90-day non-delinquency period" conflicts with the March 16 amendments to 47 C.F.R. § 1.2110 (*see* 63 FR 2315 at 2346), as announced in the September 18, 1998 Guidance Notice, providing for an second automatic grace period, particularly given that the resumption date was reset to July 31, 1998.

Moreover, and significantly, since the FCC cannot determine the amount due, then it can hardly satisfy the necessary precondition of 47 C.F.R. § 1.2110(f)(4)(iv) that "[a]ny eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period. . . ." There is no calculus of what amounts were due, and no way to determine on a given date whether any late fee, interest payment, interest or principal in fact was due, or whether the alleged default was attributable to late fees, interest or principal.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 99-5063

IN RE NEXTWAVE PERSONAL COMMUNICATIONS, INC., DEBTOR

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

NEXTWAVE PERSONAL COMMUNICATIONS, INC., APPELLEE

Argued: Nov. 1, 1999
Decided: Dec. 22, 1999

Before: MCLAUGHLIN, JACOBS and SACK, Circuit Judges.

PER CURIAM.

The Federal Communications Commission (the "FCC") appeals from an order of the United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*, *NewWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311 (S.D.N.Y. 1999), affirming five decisions and orders of the United States Bankruptcy Court for the Southern District of New

York (Adlai S. Hardin, Jr., *Bankruptcy Judge*)[1] On November 24, 1999, we issued an order reversing the judgment of the district court and remanding the case for further proceedings, with an opinion to follow. This is that opinion.

In pertinent part, the decisions and orders of the bankruptcy court, affirmed by the district court judgment from which the FCC appeals, held that the FCC's grant to NextWave Personal Communications, Inc. ("NextWave") of sixty-three radio spectrum licenses for which NextWave had been the high bidder at the FCC's 1995-96 "C-block" auction (the "Licenses") was a constructively fraudulent conveyance for purposes of 11 U.S.C. § 544 ("§ 544"). *See NextWave* IV.A, 235 B.R. at 304. The bankruptcy court therefore

---

[1] *In re NextWave Personal Communications, Inc.*, 235 B.R. 314 (Bankr. S.D.N.Y. 1999) (June 16, 1999 decision denying motion to lift automatic stay) (*NextWave* V); (*NextWave Personal Communications, Inc. v. FCC* (*In re NextWave Personal Communications, Inc.*), 235 B.R. 277 (Bankr. S.D.N.Y. 1999) (May 12, 1999 decision on fraudulent conveyance claim) (*NextWave* IV.A) *as supplemented by NextWave Personal Communications, Inc. v. FCC* (*In re NextWave Personal Communications, Inc.*), 235 B.R. 305 (Bankr. S.D.N.Y. 1999) (June 22, 1999 decision on remedy (*NextWave* IV.B); *NextWave Personal Communications, Inc. v. FCC* (*In re NextWave Personal Communications, Inc.*), No. 98-21529 (Bankr. S.D.N.Y. Apr. 2, 1999) (oral denial of FCC's motion to dismiss) (*NextWave* III); *NextWave Personal Communications, Inc. v. FCC* (*In re NextWave Personal Communications, Inc.*), 235 B.R. 272 (Bankr. S.D.N.Y. 1999) (Feb. 16, 1999 decision denying to FCC and granting to debtor partial summary judgment with regard to date upon which obligations were incurred) (*NextWave* II); *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.*), 235 B.R. 263 (Bankr. S.D.N.Y. 1998) (Dec. 7, 1998 decision granting in part and denying in part FCC's motion to dismiss) (*NextWave* I).

avoided $3.7 billion of NextWave's $4.74 billion obligation to the FCC, allowing NextWave to keep the Licenses while it reorganized in bankruptcy. *See NextWave* IV.B, 235 B.R. 305. We hold that the bankruptcy court had no authority thus to interfere with the FCC's system for allocating spectrum licenses, and that in any event it wrongly concluded that the Licences were fraudulently conveyed by failing to defer to the FCC's interpretation of its own regulations when determining the point at which NextWave's obligations were incurred for § 544 purposes. We therefore reverse the judgment of the district court affirming the orders of the bankruptcy court and remand the case to the bankruptcy court for further proceedings consistent with this opinion, if any are necessary.

BACKGROUND

In 1993 Congress passed several amendments to the Federal Communications Act (the "FCA"), one of which added § 309(j). *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 312, 387 (1993). Section 309(j) authorized the FCC to conduct competitive bidding auctions for radio spectrum licenses. The FCC was instructed to ensure that as part of its auction plan certain blocks of spectrum would be reserved for qualified entities, including small businesses, and that deferred payment plans on favorable terms would be available to them. *See* 47 U.S.C. § 309(j)(3)(B), (j)(4)(D). Pursuant to these instructions, the FCC reserved a block of 493 licenses known as the "C-block licenses" for the use of qualified entities providing "personal communications services," an emerging form of wireless communications technology.

On May 6 and July 16, 1996, the FCC concluded two sets of C-block auctions, which produced some ninety successful bidders.[2] NextWave, a startup company established to take advantage of the opportunities created by § 309(j), was the high bidder for sixty-three C-block licenses. Its aggregate winning bids amounted to $4.74 billion.

Pursuant to the FCC regulations issued under § 309(j), winning bidders that were "small businesses" were required to pay only ten percent of their winning bids in cash; the remaining ninety percent could be paid in installments over a ten-year period at below market interest rates. 47 C.F.R. § 24.711(b)(3). NextWave made the required five percent down payment on the Licenses when it was announced as the high bidder on them in the summer of 1996,[3] and subsequently deposited another five percent with the FCC on January 9, 1997, immediately after its application for the Licenses was conditionally approved.

---

[2] The C-block auctions ending July 16 involved licenses that became available when high bidders from the first auction defaulted on their initial down payments.

[3] As part of the FCC's auction rules, bidders were required to deposit "qualifying amounts" in order to participate in the auction. NextWave deposited qualifying amounts of $79,225,000 on December 1, 1995 and $6,984,244 on June 13, 1996. On May 6, 1996 it was declared the winner of 56 of the Licenses, for which it deposited an additional $130,834,333 with the FCC. On July 16 it was named the winner of an additional seven Licenses, for which it deposited $20,138,825 on July 23. At the close of the bidding process, it had therefore deposited a total of $237,182,402, or approximately five percent of its winning bids, with the FCC. *See NextWave* II, 235 B.R. at 273.

The four-month gap between those two dates resulted from the FCC's auction rules under which a winning bid did not automatically trigger the grant of the license or licenses in question. A winning bidder was required to submit a "long form" application, and the grant of a winning bidder's licenses was conditioned upon that bidder's ability to demonstrate through its application that it was in compliance with FCC regulations and statutory requirements. While over ninety percent of the winning bidders at the C-block auctions were granted their licenses on September 17, 1996, NextWave's ownership structure, specifically its allegedly impermissibly high percentage of foreign ownership, was challenged. The Licenses were conditionally granted to NextWave on January 3, 1997, after NextWave submitted to the FCC a plan to bring its capital structure into compliance with FCC regulations. On February 14, 1997, the FCC granted NextWave the Licenses conditioned upon NextWave issuing a series of promissory notes for the balance of its payments. On February 19, 1997, NextWave executed these promissory notes (the "Notes"), backdated to January 3. The Notes aggregated $4.27 billion, representing the remaining ninety percent of the bid price. By the time the Notes were executed, however, the market value of the Licenses, as later determined by the bankruptcy court, *see NextWave* IV.A, 235 B.R. at 303, had fallen to less than a quarter of the amount "that NextWave" had bid for them.

The C-block auctions were part of a series of auctions the FCC conducted to allocate spectrum for new technological uses. Prior to the C-block auctions, it had conducted the A and B-block auctions, and in June 1996 it announced that it would conduct the D, E and F-block

auctions starting on August 26, 1996. The winning bids at the A, B, D, E and F-block auctions were sharply lower than the winning bids at the C-block auctions when measured in dollars per MHz-Pop, a generally accepted industry measurement standard.[4]

Since they were obligated to pay what turned out to be much higher prices for their licenses than other licensees, most of the winning C-block bidders, including NextWave, had difficulty securing the financing necessary for them to meet their financial commitments. They thus faced the prospect of an early default on their installment payments to the FCC.

The winning C-block bidders therefore petitioned the FCC for relief. In response, the FCC suspended the C-block installment payments and initiated an elaborate administrative process looking toward a restructuring of the C-block licensees' obligations.

On October 16, 1997, at the culmination of this process, the FCC issued a restructuring order, *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal*

---

[4] The MHz, or megahertz of radio frequency, in question determines the carrying capacity of a block of wireless spectrum. The A, B, and C-block licenses consisted of 30 MHz of spectrum; the D, E, and F-blocks of 10. One "Pop" represents 1000 persons within the geographic area covered by a particular licensing block. $/MHz-Pop therefore measures the amount paid for a license that would allow the provision of a particular level of communications data to a particular number of people. NextWave's winning bids averaged at least $1.43/MHz-Pop, whereas the D, E, and F-block winning bids averaged $.33/MHz-Pop. The F-block auction, which like the C-block auction was reserved for qualified entities, produced winning bids that averaged only $.246/MHZ-pops.

Communications Services (PCS) Licensees, Second Report and Order, FCC 97-342, 12 F.C.C.R. 16436 (Oct. 16, 1997), 1997 WL 643811 (F.C.C.) (the "Restructuring Order"), which offered troubled C-block license holders three mutually exclusive restructuring options, ranging from amnesty—return of the licenses in exchange for forgiveness of debt obligations—to a plan that allowed bidders to keep as many of their licenses as they could pay for by converting seventy percent of their down payment into a prepayment of the full bid price of a smaller number of licenses. The FCC decided that it would be contrary to the public interest to forgive a portion of the obligations, thereby allowing bidders to keep their licenses at a significantly reduced price, because the C-block auction had been designed to ensure that licenses were allocated to users who could demonstrate, through their ability to pay the highest price, that they possessed the most highly valued use for the licenses. *Id.* at ¶¶ 5, 19.

In response to the oppositions, petitions and replies that it received after the release of the Restructuring Order, the FCC issued a reconsideration order on March 24, 1998. *See In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Order on Reconsideration of the Second Report and Order*, F.C.C. 98-46, 13 F.C.C.R. 8345 (Mar. 24, 1998), 1998 WL 130176 (F.C.C.) (the "Reconsideration Order"). The Reconsideration Order offered licensees slightly more flexibility in their decision-making process than the Restructuring Order, but otherwise left the Restructuring Order's framework intact. In response to still further petitions from C-block licensees, the FCC conducted yet more pro-

ceedings and issued a second reconsideration order, *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Second Order on Reconsideration of the Second Report and Order*, F.C.C. 99-66, 14 F.C.C.R. 6571 (Apr. 5, 1999), 1999 WL 183822 (F.C.C.) (the "Second Reconsideration Order"), which essentially reaffirmed the determinations the FCC had made in its previous two orders.

NextWave actively participated in the administrative process that led to the promulgation of these orders, but it remained dissatisfied with the results. On May 29, 1998, NextWave filed a petition with the Court of Appeals for the District of Columbia Circuit asking for review of the orders. On June 8, 1998—the deadline for selecting from the menu of restructuring options provided by the orders—it asked both the FCC and the Court of Appeals for a stay of those orders so that it would have more time to consider its options. The FCC and the Court of Appeals each denied NextWave's request. *See NextWave Telecom Inc. v. FCC*, No. 98-1255 (D.C. Cir. June 11, 1998); *In the Matter of Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998, Personal Communications Services C Block Election Date*, FCC 98-104, 13 F.C.C.R. 11880 (June 1, 1998), 1998 WL 278735 (F.C.C.). The same day, NextWave filed a Chapter 11 petition and instituted an adversary proceeding against the FCC that sought to avoid the company's obligations resulting from its acquisition of the Licenses. *See NextWave I*, 235 B.R. at 267.

NextWave asserted two claims in the adversary proceeding. First, it argued that the transaction in which it acquired the Licenses was a fraudulent conveyance subject to avoidance under § 544 of the Bankruptcy Code (the "Code"). Second, it sought equitable subordination of the FCC's claim based on the FCC's "inequitable, unconscionable and unfair conduct" in auctioning the D, E and F-block licenses before approving NextWave's application for the C-block Licenses. The FCC moved to dismiss both claims.

The bankruptcy court dismissed the second claim for lack of subject matter jurisdiction, *see NextWave I*, 235 B.R. at 271; NextWave has not appealed from that order. Only the first claim is therefore before us. The FCC argued below that the bankruptcy court also lacked subject matter jurisdiction over this claim because jurisdiction over actions brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals pursuant to 28 U.S.C. § 2342 and 47 U.S.C. § 402. The FCC also argued that the FCA preempted state fraudulent conveyance law. The bankruptcy court rejected these arguments, holding that for purposes of the fraudulent conveyance claim, the FCC was acting in its capacity as creditor rather than as regulator. *See NextWave I*, 235 B.R. at 269-71. The court therefore concluded that it had jurisdiction over the claim, and further found that the FCA did not conflict with or preempt its application of fraudulent conveyance law under § 544.

Section 544(b) of the Code allows the avoidance of "any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law." Applicable law includes various

state fraudulent conveyance statutes, many based on the Uniform Fraudulent Transfer Act.[5] *See Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996). In analyzing a fraudulent conveyance claim under the act, courts determine whether the debtor was engaged or about to engage in a transaction for which the remaining assets of the debtor were unreasonably small in relation to the size of the transaction. If so, and if the consideration provided by the debtor for the allegedly fraudulent transfer was not reasonably equivalent to what the debtor received in return on the effective date of the transfer, then the transfer is deemed constructively fraudulent and can be avoided.[6] *See NextWave IV.A*, 235 B.R. at 287-89. In NextWave's case, if there is a § 544 claim at all, its resolution turns on when NextWave's obligations to pay arose. If that is deemed to be the close of the C-block bidding, then the transfer could not be constructively fraudulent because NextWave paid exactly the market price for the Licenses as of that date, as determined by its own bid. *See NextWave* IV.A, 235 B.R. at 297 n.9. However, if the effective date is deemed to be January 3, the date on which the Licenses were conditionally granted, or February 19, 1997, the date on which they were finally granted in return for the executed Notes, then the obligation when it arose was for an amount far greater than what the

---

[5] The bankruptcy court applied California, New York, and Washington, D.C. fraudulent conveyance law as the "applicable law," holding that there was no substantive difference between the laws of the three jurisdictions. *See NextWave IV.A*, 235 B.R. at 288-89.

[6] Avoidance differs considerably from rescission. Rescission unwinds the transaction and restores the status quo ante, whereas avoidance allows the debtor to retain the benefit of its bargain while rewriting the debtor's obligations under that same bargain.

bankruptcy court deemed to be the market price of the Licenses.

Hoping to resolve this issue quickly, the FCC moved for summary judgment on the question of when NextWave's $4.74 billion obligation was incurred. Despite the FCC's argument that under its regulations the entire obligation became due at the close of the C-block auction, the bankruptcy court found that the effective date of NextWave's obligations for the purposes of § 544(b) was January 3, 1997. *See NextWave II*, 235 B.R. at 276. The court acknowledged that, 47 C.F.R. § 1.2104 subjected a winning bidder to a penalty upon default based on the difference between its bid and the high bid on reauction of the licenses, but held that "[n]othing in this calculation explicitly or implicitly binds the winning bidder to the full amount of its bid." *Id.* at 275.

The FCC then moved to dismiss the complaint on the ground that the avoidance claim challenged a contractual relationship with the United States entered into pursuant to a national regulatory scheme, and that federal common law, rather than state fraudulent conveyance law, therefore was the "applicable law" under § 544. In an oral decision, *NextWave III*, tr. at 50-51, the bankruptcy court refused to create new federal common law to govern the situation, reasoning that fraudulent conveyance law did not abrogate the explicit terms or purposes of the regulatory scheme under § 309(j). *See id.* tr. at 53-54.

The parties then proceeded to trial. The bankruptcy court concluded under California law that NextWave's obligations were incurred on February 19, 1997; that on that date the Licenses were worth $1,023,211,000; and

that all obligations above that amount were constructively fraudulent and therefore avoided. Since NextWave had already paid $474,364,806, or ten percent of its original high bid, to the FCC as a down payment, the remaining obligation was reduced to $548,846,194. *See NextWave IV.A*, 235 B.R. at 304; *NextWave IV.A*, 235 B.R. at 306. The avoidance remedy allowed NextWave to keep the Licenses while obligating it to pay less than one-quarter of the amount it had bid for them.

The FCC appealed to the district court, which affirmed for substantially the reasons stated by the bankruptcy court. *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311 (S.D.N.Y. 1999). This appeal, which we have heard on an expedited basis, followed.

DISCUSSION

I. Standard of Review

Our review of the district court's decision affirming the bankruptcy court orders is plenary. We therefore undertake an independent examination of the legal and factual findings of the bankruptcy court, reviewing its findings of law de novo and its findings of fact for clear error. *See Kabro Assocs. v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 273 (2d Cir. 1997).

II. The Authority of the Bankruptcy and District Courts

The radio (or electromagnetic) spectrum belongs to no one. It is not property that the federal government can buy or sell. It is no more government-owned than

is the air in which Americans fly their airplanes or the territorial waters in which they sail their boats.

Although not owned by the federal government, the radio spectrum is subject to strict governmental regulation.

> Before 1927, the allocation of [radio] frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-76, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969) (footnotes omitted). The scarcity of radio frequencies therefore required a regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to specific users. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 637-38, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994); *see also National Broadcasting Co. v. United States*, 319 U.S. 190, 216, 63 S. Ct. 997, 87 L.Ed. 1344 (1943) ("The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply."). Since 1934, that mechanism has been the licensing of blocks of spectrum for the "public interest, convenience, or necessity," under the FCA, 47 U.S.C. § 307(a), by the FCC. *See generally FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 136-38, 60 S. Ct. 437, 84 L.Ed. 656 (1940).

A license does not convey a property right; it merely permits the licensee to use the portion of the spectrum covered by the license in accordance with its terms. *See* 47 U.S.C. § 301 (stating the purpose of the FCA, "to provide for the use of [radio] channels, but not the ownership thereof"); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475, 60 S. Ct. 693, 84 L.Ed. 869 (1940) ("[N]o person is to have anything in the nature of a property right as a result of the granting of a license."). Licenses are revocable by the FCC, and the FCC can impose conditions upon them in the name of the public good. *See* 47 U.S.C. § 308(b).

Historically, the FCC assigned licenses through a system of comparative hearings, rating and ranking applicants under a public interest standard. *See* 47 U.S.C. § 309(a). Partially in response to the huge administrative burden that this method of allocation placed on the FCC, Congress amended the FCA in 1981 by adding § 309(i), which allowed the FCC to award licenses by randomly selecting licensees from the qualified applicant pool. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1242, 95 Stat. 357, 736 (codified at 47 U.S.C. § 309(i)).

The use of lotteries lessened the administrative burden, but encouraged speculation and, ultimately, failed to allocate licenses to those most likely to use them most efficiently or beneficially. Especially in light of the proliferation of new spectrum-dependent communications technologies, a method was needed that would direct licenses toward those entities and technologies that would put them to the best use. *See* H.R. Rep. No. 103-111, at 248 (1993) (the "Committee Report"), *reprinted in* 1993 U.S.C.C.A.N. 378, 575.

In its search for such a methodology, Congress came to the conclusion that using market forces to allocate spectrum could accomplish congressionally defined policy goals. As the House Committee on Energy and Commerce explained, "[A] carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves." *Id.* at 253, *reprinted in* 1993 U.S.C.C.A.N. at 580. Congress therefore enacted 47 U.S.C. § 309(j) authorizing the FCC to develop a system for allocating spectrum through a competitive bidding process. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 312, 387 (1993). Section 309(j)(3) requires the FCC to design a system of competitive bidding that protects the public interest and promotes the following substantive objectives:

> (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
>
> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

> (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; [and]
>
> (D) efficient and intensive use of the electromagnetic spectrum. . . .

47 U.S.C. § 309(j)(3).

While the FCC was expected to "recover[ ] for the public a portion of the value of the public spectrum" and to avoid "unjust enrichment," the broader purpose of § 309(j) was to create an efficient regulatory regime based on the congressional determination that competitive bidding is the most effective way of allocating resources to their most productive uses. The FCC was not asked to sell off the spectrum (something it did not own) in an effort to raise as much money as possible; it was not asked to develop a free-market system to maximize revenue.[7] Instead, it was told to auction

---

[7] Section 309(j)(7)(A) specifically limits the degree to which the FCC can designate the generation of revenue as a factor in the "public interest," demonstrating Congress's intent that satisfaction of the FCA's objectives not be equated with income maximization. "[T]he Commission may not base a finding of public interest, convenience, and necessity on the expectation of federal revenues." 47 U.S.C. § 309(j)(7)(A). "While Congress has charged [the FCC] to recover a portion of the value of the public spectrum made available via competitive bidding," the process "does not amount to maximizing revenue, nor is it [the FCC's] sole objective." *In the Matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Second Report and Order*, FCC 94-61, 9 F.C.C.R. 2348 ¶ 73 (Apr. 20, 1994), 1994 WL 412167 (F.C.C.).

licenses to the highest bidder because such a system was thought likely to promote the development of new technologies and encourage efficient use of the spectrum while simultaneously recouping some of the value of the spectrum for the public. *See* Committee Report at 253, *reprinted in* 1993 U.S.C.C.A.N. at 580.

In implementing § 309(j), the FCC echoed the congressional rationale: "[A]uction designs that award licenses to the parties that value them most highly will best achieve" the goals set forth by Congress. *In the Matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Second Report and Order*, FCC 94-61, 9 F.C.C.R. 2348 ¶ 70 (Apr. 20, 1994), 1994 WL 412167 (F.C.C.) ("Second Order"). The FCC's views reflect a classical belief in the efficacy market forces:

> Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to a bidder, an auction design that awards licenses to those bidders with highest willingness to pay tends to promote the development and rapid deployment of new services in each area and the efficient and intensive use of the spectrum.

Id. ¶ 71.

Starting from this premise—that "[b]ecause new licenses would be paid for, a competitive bidding system [would] ensure that spectrum is used more productively and efficiently than if handed out for free," Committee Report at 249, *reprinted in* 1993 U.S.C.C.A.N. at 576—the FCC made "full and timely payment of the winning bid" a regulatory condition for obtaining and

retaining a spectrum license acquired through a § 309(j) auction. *See* 47 C.F.R. § 24.708.

This "payment in full" requirement has a regulatory purpose related directly to the FCC's implementation of the spectrum auctions. The FCC gave considerable thought to the problem of how to "deter frivolous or insincere bidding." Second Order ¶ 171. It decided that it would be "critically important to the success of our system of competitive bidding . . . [to] provide strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and reauction." *Id.* ¶ 197.

Generally, bidders were required to obtain purely private financing and to pay up front for their licenses.[8] *See* 47 C.F.R. § 1.2109(a); Second Order ¶ 194. But "designated entities," such as NextWave—"designated" because they were less financially powerful than non-"designated" bidders and therefore presumably unable to pay up front—were allowed to pay in installments. *See* 47 C.F.R. § 24.711(b); Second Order ¶ 194. It was important for the functioning of the auction of licenses to "designated entities" that the FCC's default rules and penalties be enforceable, because the FCC relied upon them as a substitute for conducting the "detailed credit checks" and other forms of due diligence that otherwise would be necessary to ensure, within the framework of a competitive auction method of spectrum allocation, that the licenses would

[8] "Designated entities" include "small businesses, rural telephone companies and women and minority-owned firms." Order ¶ 6.

be awarded to the appropriate entities. *See* Second Order ¶¶ 194, 197-98.[9]

For entities like NextWave that chose to pay the balance of their winning bids in installments, payment of the installments in full was explicity made a condition of license retention. *See* 47 C.F.R. § 1.2110(f)(4)(iii). When this condition was challenged as a result of the precipitous decline in auction values following the C-block auction, the FCC conducted extensive administrative proceedings on the question and produced three orders declaring that C-block bidders could not keep their licenses without paying the full price for them. *See restructuring Order* ¶¶ 2, 5; *Reconsideration Order* ¶¶ 2, 10; *Second Reconsideration Order* ¶ 1. It sought in this manner to adhere to the fundamental rationale of the competitive scheme: Those qualified bidders who could pay the most were those who should be awarded the licenses. *See Restructuring Order* ¶ 19; *see also Second Order* ¶ 5. These rules and orders, which express the FCC's expert judgment as to the course that would best promote congressional objectives and serve the public interest, thus manifest substantive regulatory decisions about the allocation of spectrum.

Despite the new statutory scheme for allocating spectrum, the FCA draws no categorical distinctions among the three methods of license allocation—comparative hearing, lottery and auction. Each is pre-

---

[9] The district court below held that the avoidance remedy requested by NextWave had "nothing to do with" the organization, execution, or implementation of the auctions. *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311 (S.D.N.Y. 1999). *See* infra at 36.

sumed to be a regulatory tool for ensuring that licenses are distributed in the way that fulfils the goals of the FCA. *See* 47 U.S.C. § 309(a). And each license, on whatever basis it is awarded, is not to "be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301.

A. The FCC and the Courts

The Supreme Court has emphasized that the FCA's "terms, purposes, and history all indicate that Congress formulated a unified and comprehensive regulatory system." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168, 88 S. Ct. 1994, 20 L. Ed. 2d 1001 (1968) (internal quotation marks and citation omitted). "Congress assigned to the Federal Communications Commission . . . exclusive authority to grant licenses" under the Act. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 553, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990), *overruled on other grounds, Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). The FCC was "expected to serve as the single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." *Southwestern Cable Co.*, 392 U.S. at 168, 88 S. Ct. 1994 (internal quotation marks and footnotes omitted). In this case, we are required to "enforce the spheres of authority which Congress has given to the Commission and the courts, respectively, through its scheme for the regulation of" radio transmissions. *Pottsville Broadcasting Co.*, 309 U.S. at 136-37, 60 S. Ct. 437.

For over fifty years the Supreme Court has recognized that under the FCA the division of authority

between these "spheres" requires that "no court can grant an applicant an authorization which the Commission has refused." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14, 62 S. Ct. 875, 86 L.Ed. 1229 (1942). Under the FCA, it is the FCC and not the courts that "must be satisfied that the public interest will be served by . . . the license." *FCC v. WOKO, Inc.*, 329 U.S. 223, 229, 67 S. Ct. 213, 91 L.Ed. 204 (1946).

The FCC's exclusive jurisdiction extends not only to the granting of licenses, but to the conditions that may be placed on their use:

> An FCC licensee takes its license subject to the conditions imposed on its use. These conditions may be contained in both the Commission's regulations and in the license. Acceptance of a license constitutes accession to all such conditions. A licensee may not accept only the benefits of the license while rejecting the corresponding obligations.

P & R Temmer v. FCC, 743 F.2d 918, 927 (D.C. Cir. 1984).

If the conditions to which a license is subject are not met, the FCC may revoke the license. It is beyond the jurisdiction of a court in a collateral proceeding to mandate that a licensee be allowed to keep its license despite its failure to meet the conditions to which the license is subject.

When the FCC decise which entities are entitled to spectrum licenses under rules and conditions it has promulgated, it therefore exercises the full extent of its regulatory capacity. Because jurisdiction over claims brought against the FCC in its regulatory capacity lies

exclusively in the federal courts of appeals, *see* 28 U.S.C. § 2342; 47 U.S.C. § 402, the bankruptcy and district courts lacked jurisdiction to decide the question of whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses.

B. The Rulings of the Bankruptcy and District Courts

It is against this background that the inability and consequent failure of NextWave to pay for its C-block Lincenses must be considered. The FCC had not sold NextWave something that the FCC had owned; it had used the willingness and ability of NextWave to pay more than its competitors as the basis on which it decided to grant the Licenses to NextWave. NextWave's inability to follow through on its financial undertakings had more than financial implications. It indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the Licenses efficiently for the benefit of the public in whose interest they were granted. It meant, in regulatory terms, that NextWave was not entitled to the Licenses.

NextWave urged the bankruptcy and district courts to treat these proceedings as "a simple bankruptcy case." The courts apparently agreed. The bankruptcy court found that "the issues before [it] . . . concern[ed] solely the debtor-creditor relationship between the FCC and [NextWave]." *NextWave V*, 235 B.R. at 314. According to the district court, "[t]he claim ha[d] nothing to do with the FCC's 'organization, execution, or implementation' of the radio spectrum auction. Neither d[id] the claim implicate the FCC's

power to regulate the issuance or use of spectrum licenses." *NextWave*, 241 B.R. 311.

This approach was fundamentally mistaken. The FCC's auction rules promulgated under § 309(j) have primarily a regulatory purpose: to ensure that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives. The fact that market forces are the technique used to achieve that regulatory purpose does not turn the FCC into a mere creditor, any more than it turns an FCC license won at auction into a property estate in spectrum. Nothing about putting spectrum licenses up for auction rendered them anything other than licenses, and the sole responsibility for the allocation of licenses lies with the FCC, with appeal to the courts of appeals, not the bankruptcy or district court.

By holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion, the bankruptcy and district courts impaired the FCC's method for selecting licensees by effectively awarding the Licenses to an entity that the FCC determined was not entitled to them.[10] In so doing they exercised the FCC's radio-licensing function. *Cf. National Broadcasting Co.*, 319 U.S. at 224, 63 S. Ct. 997. "[T]he weighing of policies under the 'public

[10] The rules of construction included within § 309(j) reinforce this understanding. They say, "Nothing . . . in the use of competitive bidding shall . . . (C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses." 47 U.S.C. § 309(j)(6)(C). In other words, even when they are *allocated* through the use of competitive bidding, spectrum licenses remain just that, *licenses* subject to regulation and reclamation by the FCC.

interest' standard is a task that Congress has delegated to the Commission in the first instance," *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596, 101 S. Ct. 1266, 67 L. Ed. 2d 521 (1981) (internal quotation marks and citation omitted), with deferential judicial review reserved to the courts of appeals. But even if the bankruptcy and district courts were right in concluding that granting the Licenses at a small fraction of NextWave's original successful bid price best effectuated the FCA's goals, *see NextWave III*, 241 B.R. 311; *NextWave IV.B*, 235 B.R. at 311-12, they were utterly without the power to order that NextWave be allowed to retain them for that reason or on that basis. *See Scripps-Howard Radio, Inc.*, 316 U.S. at 14, 62 S. Ct. 875.

This is not to say that these courts lacked jurisdiction over every aspect of the relationship between the FCC and NextWave. To the extent that the financial transactions between the two do not touch upon the FCC's regulatory authority, they are indeed like the obligations between ordinary debtors and creditors. NextWave's arguments that the FCC seeks to frustrate the purposes of the bankruptcy laws are therefore misplaced. We are merely holding that NextWave may not collaterally attack or impair in the bankruptcy courts the license allocation scheme developed by the FCC.[11]

[11] The bankruptcy court held: "The basic defect in the FCC's argument is that Congress did not confer upon the FCC the power to determine unilaterally its own rights as a creditor in competition with and to the detriment of other creditors." *NextWave I*, 235 B.R. at 270. That is surely true. But as we have repeatedly stated, that analysis is misplaced if it allows the bankruptcy court to adjudicate claims against the FCC not as a creditor, but as an allocator of licenses. Such was the case here. As for NextWave's

As Justice Frankfurter noted nearly sixty years ago, "[t]he Communications Act . . . expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *Pottsville Broadcasting Co.*, 309 U.S. at 138, 60 S. Ct. 437. In response to changing technological imperatives and policy preferences, Congress and the FCC have chosen to manage the "dynamic aspects" of spectrum allocation in a new way, by employing market forces in an attempt to ensure efficient and publicly beneficial resource allocation. Despite subsequent revolutions in technology, however, the observation of Justice Frankfurter still holds: In order for Congress's prescribed regulatory system to function properly in a dynamic environment, the FCC's allocative decisions must not be interfered with by other instrumentalities of the federal government acting beyond their statutory authority.

III. Constructive Fraud

While we reverse the district court's affirmance of the bankruptcy court orders issued in the adversary proceeding, and hold that these courts lacked jurisdiction to employ remedies that abrogate the FCC's licensing authority, we recognize that NextWave will remain a debtor in bankruptcy. If the Licenses are returned to the FCC, the bankruptcy court may resolve resulting financial claims that the FCC has against NextWave as it would the claims of any government agency seeking to recover a regulatory penalty or an obligation on a debt. In light of these possible further

---

other creditors, jurisdiction in the bankruptcy and district courts is not created by any interest these creditors might have in NextWave retaining but avoiding payment on the Licenses.

proceedings, there remains for us the question of the nature of NextWave's obligation, which the bankruptcy court decided, *see NextWave IV.A*, 235 B.R. at 287-91, and which may on remand have substantial effect on the determination of the FCC's rights as creditor.[12] We hold, contrary to the rulings by the bankruptcy and district courts, that NextWave became obligated to the FCC for the full amount of its winning bids at the close of the C-block auction, and that the transaction in which the Licenses were issued was therefore not constructively fraudulent.

Under the avoidance provisions of the Code, a transfer or obligation is or is deemed to be a fraudulent conveyance—and therefore avoidable—if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." 11 U.S.C. §§ 544, 548(a)(2)(A) (1993 & Supp. 1999).[13] It is uncontested that the question of reasonably equivalent value is determined by the "value of the consideration exchanged between the parties *at the time of the conveyance or incurrence of debt* which is challenged." *NextWave IV.A*, 235 B.R. at 290 (citing *In re Best Products Co.*, 168 B.R. 35, 54 (Bankr. S.D.N.Y. 1994)) (emphasis added).

---

[12] Because the consequences of constructive fraud are not limited to 11 U.S.C. § 544, we believe appellate consideration of this holding is necessary.

[13] Both NextWave and the FCC concede that any choice-of-law questions as to the fraudulent conveyance issue are obviated by the coincidence of § 548, on the one hand, and the applicable New York, California, and Washington, DC laws, on the other. *See NextWave IV.A*, 235 B.R. at 289.

The date on which the payment obligation arose is therefore crucial to whether this obligation is avoidable. If NextWave incurred the obligation at the close of the auctions, then the value of the Licenses would by definition be $4.74 billion, since "the fair market values of the C block licenses were equivalent to the bids accepted by the FCC at the close of the auction and reauction." *NextWave IV.A*, 235 B.R. at 297 n.9 (noting NextWave's concession of this point). And if the fair market value was $4.74 billion, then there was no constructive fraud. On the other hand, if the obligation first arose on or about the date on which the Licenses were conditionally granted (following the fall-off in auction prices at the D, E and F-block auctions), then the $4.74 billion bid exceeded the fair market value as measured by the subsequent auction prices.

The bankruptcy court held that NextWave's payment obligation did not arise until the conditional grant of the Licenses on January 3, 1997. The court placed great weight on the idea that an obligation evidenced by a writing arises when the writing is delivered:

> Generally an obligation is incurred when a debtor becomes legally obligated to pay. *In re Emerald Oil Co.*, 695 F.2d 833, 837 (5th Cir. 1983); *Barash v. Public Finance Corp.*, 658 F.2d 504, 511 (7th Cir. 1981); *see also In re G. Survivor Corp.*, 217 B.R. 433, 440 (Bankr. S.D.N.Y. 1998). While the Bankruptcy Code is silent on the question of when a debt or obligation is "incurred," courts have not questioned that an "obligation" to pay principal indebtedness under a promissory note is "incurred" on the date the note is executed and delivered. *E.g.*, *In re Iowa Premium Service.*, 695 F.2d 1109, 1111-12 (8th Cir. 1982); *In re Smith-Douglass, Inc.*, 842 F.2d 729, 730 (4th Cir. 1988); *In re Pippin*, 46 B.R. 281, 283-84 (Bankr. W.D. La. 1984) (holding that, for preference purposes, debtor becomes legally obligated to pay under installment payment contract when contract is executed). The California [Uniform Fraudulent Transfer Act] provides that "[a]n obligation is incurred . . . if evidenced by a writing, when the writing executed by the obligor is delivered to, or for the benefit of, the obligee." Cal. Civ. Code § 3439.06(e)(2) [(1997)].

NextWave IV.A, 235 B.R. at 289 (ellipsis and second set of brackets in original).

The obligation to pay the *Notes* attached upon their delivery, as the writing rule confirms, but that observation begs the crucial question: When did NextWave take on the obligation to pay $4.74 billion for what it bid at auction? And that question suggests another: What did NextWave bid $4.74 billion to get?

We conclude that NextWave bid $4.74 billion for the right—excluding other bidders—to be the qualified licensee of the Licenses, and became obligated to assure payment of $4.74 billion for the Licenses either by cash and credit on delivery or by submitting to liability for the shortfall if NextWave—which knew the rules for qualification—failed to qualify.

Our ruling is based on the FCC's interpretation of its own regulations, to which courts owe deference, but to which the courts below refused deference on grounds we conclude are invalid. The FCC's interpretation is supported, in turn, by the auction law principle that an

obligation attaches when the seller no longer can reject the bidder's offer as a matter of discretion.[14]

A. FCC Regulations

The FCC's rules establish the close of the auction as the time of obligation. The FCC's formal interpretation of its own regulations, albeit issued after the auction, provides that the binding obligation to pay the full bid price attaches to the winning bidder "upon acceptance of the high bid." *In re Applications for Assignment of Broadband Personal Communications Services Licenses*, FCC 98-301 (Dec. 23, 1998), 1998 WL 889489

[14] Because we believe there are adequate other grounds for reversing the courts below in this case, and because we think the FCC has provided us with a rational interpretation of its regulations that warrants our deference, we do not reach the question of whether federal common law governs auctions conducted pursuant to the FCA in the absence of satisfactory statutory or regulatory guidance. If we were to apply federal common law, it would not be "federal common law in the strictest sense, i.e., a rule of decision that amounts, not simply to an interpretation of a federal statute, but, rather, to the judicial 'creation' of a special federal rule of decision," *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 2265, 141 L. Ed. 2d 633 (1998) (internal citations and ellipses omitted) (citing *Atherton v. FDIC*, 519 U.S. 213, 218, 117 S. Ct. 666, 136 L. Ed. 2d 656 (1997)), and federal courts often employ federal common law "principles" in interpreting federal statutes. *See, e.g., Burlington* at 2269-70 (agency); *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 1886 n.9, 141 L. Ed. 2d 43 (1998) (discussing veil piercing under CERCLA). In the present case, however, we content ourselves with reviewing and rejecting the conclusions that NextWave claims to draw from the principles of auction law. We refrain from engaging in the kind of "willful policymaking, pure and simple," *Burlington* at 2273 (Thomas, J., dissenting), that might result from drawing intuitively on purported common law "principles." *See Id.* at 2273 (decrying use of "agency principles" drawn entirely from Restatement (Second) of Agency).

(F.C.C.) ¶ 1. Other FCC publications clarify that the "acceptance of the high bid" occurs at the close of the auction: "Under the Commission's rules, [the winning bidder] became obligated for its winning bid amounts when the auction closed." *Public Notice, Auction of C, D, E, and F Block Broadband PCS Licenses*, DA-98-2604 (Dec. 23, 1998), 1998 WL 892962 (F.C.C.) at 4.

The FCC's interpretation enjoys a presumption of correctness: "We must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994); *accord New York v. Shalala*, 119 F.3d 175, 182 (2d Cir. 1997). It is not this Court's task to choose which among several competing interpretations best serves the stated regulatory purpose; "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.*, 512 U.S. at 512, 114 S. Ct. 2381 (internal quotation marks omitted); *accord New York v. Shalala*, 119 F.3d at 182. This Court defers to the agency's interpretation unless a different reading is compelled by the plain meaning of the regulation or some other indicia of the agency's intent at the time of promulgation. *See Thomas Jefferson Univ.*, 512 U.S. at 512, 114 S. Ct. 2381. Deference is especially appropriate where "the regulation concerns 'a complex and highly technical regulatory program.'" *Id.* (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697, 111 S. Ct. 2524, 115 L. Ed. 2d 604 (1991)).

In this case, the FCC interprets its regulation to mean that NextWave's obligation attached upon the close of the auction, and nothing justifies a departure

from that interpretation. At the close of the auction NextWave became obligated, if qualified, to pay the $4.74 billion bid price or, if unqualified, to pay a prescribed penalty. The FCC's penalty rules provide that default between the close of the auction and the grant of the Licenses exposes the winning bidder to liability for the amount it bid less the winning bid upon re-auction of the Licenses. *See* 47 C.F.R. § 1.2104(g)(1)-(2). This "penalty" is the functional analog of expectation damages; that is, the FCC must mitigate its harm by a re-auction, but the original winning bidder is liable for any shortfall between the subsequent winning bid and its own. So although labeled a "penalty," this remedy is fully consistent with the notion that the winning bidder becomes liable for full price of the winning bid upon the close of the auction.

The bankruptcy court, however, held that it owed no deference to the FCC's regulations or the Commission's interpretation thereof because (a) the FCC appears in bankruptcy court as a creditor rather than as a regulator, and so is due no more deference than other creditor; and (b) the deference ordinarily afforded the FCC's reading of its rules and the statute it administers is inappropriate (or at least not equally compelled) in this case by reason of the self-serving nature of the FCC's post hoc interpretation.

(a) *The FCC's Creditor Status.* The bankruptcy court treated the FCC as a creditor like any other, and thus refused to allow the FCC to construe its contractual rights (after the fact) in a way that would be binding in the bankruptcy proceeding:

> [T]he FCC's own regulations are entitled to no more nor less weight in the context of bankruptcy proceedings than the contractual notes, mortgages and similar documents required by other creditors in commercial transactions. . . . Stated simply, the FCC's regulations, *to the extent that they establish and govern the rights and obligations of the FCC and the licensee in their capacities as creditor and debtor*, are subject to modification under the Bankruptcy Code, just like the contractual rights and obligations of an ordinary creditor vis a vis its debtor.

NextWave V, 235 B.R. at 317 (emphasis added). This reasoning insufficiently accommodates the dual role that the FCC plays in this proceeding. *See supra* Part II. In granting licenses by auction, the FCC acts as creditor and regulator both. We need not decide what happens at each point of overlap, but the regulatory function is not ended by the bankruptcy of a licensee or license claimant, and as the function persists it must perforce be carried out.

True, the FCC's regulatory interpretation in this case favors the interests of the federal fisc over those of other NextWave creditors: It prevents the bankruptcy court from extinguishing approximately $3.7 billion of debt owed for the Licenses. It does not follow, however, that the FCC's regulatory interpretation is proffered by the FCC as creditor only and not as regulator in whole or part. The FCC's interpretation, which was rejected below as self-serving because it advances the FCC's interest as creditor, also advances important regulatory purposes. *See supra* Part II; *Second Order* ¶ 5; *Restructuring Order* ¶ 19.

The bankruptcy court's denial of deference to the FCC was premised on the understanding that the FCC was acting solely as a creditor in this action. Because the FCC was acting in part as a regulator as well as a creditor, we have no occasion to decide here whether the bankruptcy courts owe deference to the regulatory interpretations of agencies acting strictly as creditors. It is possible that in future proceedings the FCC may stand in a strict debtor/creditor relationship to NextWave. But since we do not know what steps the FCC will take vis-à-vis the obligations owed to it by NextWave, any issues created by the FCC's attempts to collect on those obligations are not yet ripe.[15] *Cf. Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512 (D.C. Cir.) (holding that a request for injunctive relief, made by a bidder at a spectrum auction, was not ripe when the actual order imposing default penalties had not yet issued). We limit ourselves here to finding that NextWave's obligations were incurred at the close of auction and that the transaction in which they were incurred was therefore not constructively fraudulent. Where the regulatory agency acts as both regulator and

[15] This appeal stems from an adversary proceeding initiated preemptively by NextWave. Because of the ongoing litigation, the FCC has not yet sought to take any action vis-à-vis the Licenses. While it would probably be fair to assume that the FCC will seek to revoke the Licenses and collect on its debts, we cannot presume to know in advance the course that the agency will ultimately follow. We do not know, for example, the size of the penalty the FCC may seek to recover, or even whether it will seek to recover its regulatory penalty, recover on the Notes, or recover on both. It is possible that if the FCC chooses to pursue some of these options —say, collection on the Notes—it may find itself acting as a creditor.

creditor, we owe deference to its interpretation of its regulations.

(b) *The FCC's Self-Interest.* The courts below emphasized and relied on the self-serving nature of the FCC's interpretation and a perceived lack of connection between its interpretation and the original legislative purpose of the auction regime. We have already noted that the FCC's interpretation, though financially advantageous to the federal government, also furthers regulatory goals. The financial benefits of the FCC's post hoc interpretation do not extinguish the courts' duty to give deference.

The level of judicial deference depends in part on whether an agency interpretation is consistent or in conflict with the goals of the regulation as stated when it was adopted. *See Thomas Jefferson Univ.*, 512 U.S. at 512, 114 S. Ct. 2381. As counsel for NextWave agreed at oral argument before us, one congressional goal in authorizing the FCC to conduct auctions was to achieve fair and efficient allocation of spectrum licenses. *See* Committee Report at 253, *reprinted in* 1993 U.S.C.C.A.N. at 580; *Second Order* ¶ 73. The auction mechanism can do so only if the bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue. And this goal is served only if the high bid entails the obligation to make good the amount bid, either by a qualified bidder's payment on delivery or by payment of any shortfall (upon re-auction) by a bidder who fails to qualify. If the transaction can be adjusted in bankruptcy proceedings so that the high bidder takes the license without paying the amount of the high bid, the auction as a mechanism for determining valuation is impaired.

The FCC's insistence on full payment is consistent with the goals of the auction.

B. Auction Law

The parties and the bankruptcy court make several arguments based on the principles of auction law. We do not think it is necessary to rely on or to appear to create a federal common law of auctions in order to resolve this appeal. We think that the principles of auction law are useful nonetheless, at least insofar as they confirm and reinforce the rationality of the FCC's interpretation of its regulations.

The bankruptcy court held that NextWave gained nothing at the close of the auction except the right to apply for the Licenses, relying upon the following colloquy with counsel for the FCC:

> THE COURT: Wait a second. You're asking for words, namely, "reasonably equivalent value" and that raises a question or value for what? And equivalent to what?
>
> [FCC]: To what they got.
>
> THE COURT: What did they get?
>
> [FCC]: What they got was the right to apply for these licenses that were essential to their business. And without those licenses, they would have no business.

NextWave II, 235 B.R. at 274. In summary of the court's reasoning below (which summary may not do the analysis full justice): Delivery of the Licenses, notwithstanding the auction and NextWave's high bid,

remained contingent upon the FCC's determination sometime later that NextWave's application should be granted; the auction was therefore of the kind conducted with a reserve; like such reserve auctions, the high bidder's obligation to pay did not arise when the hammer fell; the reserve in this case was not lifted until at least such time as the FCC decided to deliver the Licenses; and NextWave's obligation to pay the amount of the high bid therefore did not arise until the date on which the Licenses were delivered and the Notes delivered in exchange. We disagree. The close of the auction established the FCC's obligation to grant NextWave the Licenses if the company fulfilled statutory eligibility requirements, and NextWave became liable at that time for full payment on the Licenses at the stated price.

As in contract law more generally, a sale by auction is valid only upon offer and acceptance. *See Blossom v. Railroad Co.*, 70 U.S. (3 Wall) 196, 206, 18 L.Ed. 43 (1865); 7 *Am.Jur.2d Auctions and Auctioneering* § 20 (1997). As a baseline rule, the close of the auction—traditionally the drop of the hammer—signals acceptance of an offer and forms an enforceable contract. *See* 7 *Am.Jur.2d Auctions and Auctioneering* § 34; 7A *C.J.S. Auctions and Auctioneers* §§ 8, 12 (1980). A bidder has a right to withdraw the bid at any time before its acceptance. *See Blossom*, 70 U.S. at 206; 7 *Am.Jur.2d Auctions and Auctioneering* § 33; 7A *C.J.S. Auctions and Auctioneers* § 13. The timing of acceptance, and therefore of the creation of a contractual obligation, is different if the auction sale is conducted "with reserve": "Where the seller reserves the right to refuse to accept any bid made, a binding sale is not consummated between the seller and the bidder until

the seller accepts the bid." 7 *Am.Jur.2d Auctions and Auctioneering* § 20; *see also Blossom*, 70 U.S. at 206; 7A *C.J.S. Auctions and Auctioneers* § 11.

If by virtue of the required statutory approval, the FCC's spectrum-allocation process became an "auction with reserve," then (under the principles of auction law) NextWave's obligation to pay would not have arisen until the FCC approved the grant of the Licenses to NextWave, *after* the drop in market value reflected in (or precipitated by) the auction of the D, E and F-blocks. The finding of constructive fraud rests on that analysis. On the other hand, if the obligation to pay or make good the winning bid arose when the winning bid was announced, *before* the drop in market value, then the obligation NextWave seeks to avoid cannot be characterized as a constructive fraud.

We conclude that the obligations NextWave seeks to avoid arose no later than the announcement of the winning bid, even though the resulting contract had more terms than would be common at the auction of a saleable thing by a private seller. By conducting the auction, the FCC offered to deliver the Licenses to the qualified high bidder. By bidding, NextWave represented that it was qualified to receive the Licenses. By making the high bid, NextWave (a) assumed an obligation to pay a down-payment promptly, (b) assumed an obligation to pay in the future the amount of its bid upon receipt of the Licenses and (c) assumed the risk that it might prove unqualified, by binding itself in that event to pay the amount of any shortfall in a re-auction of the same Licenses.

The requisite statutory approval by the FCC was not a "reserve" that (until lifted) prevented any enforceable

obligation on the part of the high bidder. Auctions with reserve stand or fall as a matter of the seller's discretion, usually on the basis of the pecuniary sufficiency of the bids. *See* 7 *Am.Jur.2d Auctions and Auctioneering* § 23 (defining the phrase "without reserve" in terms of the seller's right to "withdraw[ ] the property from sale if he is not pleased with the bids"); *see also Drew v. John Deere Co.*, 19 A.D.2d 308, 241 N.Y.S.2d 267, 269-70 (1963); 7 *Am.Jur.2d Auctions and Auctioneering* § 21 ("[I]n an auction with a reserve, the auctioneer *may* withdraw the items for auction at any time until he announces completion of the sale." (emphasis added)).

The nature of the statutory approval requirement in this case is neither discretionary nor economic. The FCC's act of naming NextWave the winning bidder obligated the FCC to deliver the Licenses to NextWave, at the price determined by NextWave's winning bid, if NextWave fit certain non-economic qualifying criteria. *See In the Matter of the Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Fifth Report and Order*, FCC 94-178, 9 F.C.C.R. 5532 (July 15, 1994), 1994 WL 372170 (F.C.C.) ¶ 81 ("If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, the license(s) will be granted to the auction winner."); 47 C.F.R. § 1.2108(d)(1) ("If the Commission determines that . . . an applicant is qualified . . . it will grant the application."). NextWave cites *Mobile Communications Commission v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996), as demonstrating that the FCC has no obligation to grant the license at the bid-upon price. *MCC v. FCC*, however, dealt not with the FCC's decision that a bid price was insufficient but with the FCC's determination that the licensee was ineligible for a "pioneer's

preference" and thus had to pay for its license. *See id.* at 1408-09. The case is inapposite.

NextWave knew about the statutory criteria for approval before the bidding began. *See* 47 C.F.R. § 310(b)(4) (1991); 47 C.F.R. §§ 24.709, 24.712, 24.720 (1996). In the event, the only obstacle to closing encountered by NextWave was its own non-compliance with the foreign ownership requirements. NextWave's willingness to bid notwithstanding the undisputed fact that non-compliance would prevent delivery of the Licenses and compel NextWave to insure the government against a lower high bid at re-auction demonstrates that NextWave assumed the risk of its own non-compliance.

True, there appears to be an element of discretion in the FCC's decision to grant the Licenses conditionally, pending NextWave's compliance with statutory requirements. However, that conditional grant was temporary, *see In re Applications of NextWave Personal Communications, Inc. for various C-Block broadband PCS Licenses*, DA 97-328 (Feb. 14, 1997), at 2, and the FCC had no power to waive the statutory requirements permanently. Moreover, it was a temporary discretionary *approval;* the FCC had no authority to *reject* NextWave's bid as a matter of discretion.

Thus the FCC was obligated to deliver the Licenses at the agreed-upon price if NextWave could demonstrate that it met certain statutory and regulatory eligibility requirements, and NextWave assumed the risk of its failure to do so. The FCC was bound, and so was NextWave. After acceptance of the offer, "as a rule, the seller has no right to accept a higher bid, nor may the buyer withdraw his bid." 7 *Am.Jur.2d Auctions and Auctioneering* § 20 (1997); *see also Blossom*, 70 U.S. at 206.

The FCC's dual role in the licensing process—as offeror in the auction and as regulator thereafter—confers on the FCC prerogatives that are not enjoyed by the ordinary seller. The FCC thus retains the authority to reject a high bid for *regulatory* purposes. But NextWave knew, at the time of the auction, that the winning bidder would look to the FCC both as creditor and as regulator. If NextWave objected to the conditions imposed by the FCC or to the FCC's dual role in the transaction, NextWave could have refrained from participating in the auction.

The point is well illustrated in *United States v. Weisbrod*, 202 F.2d 629, 633 (7th Cir. 1953). In a surplus auction conducted near the end of World War II, the federal government reserved a unilateral right to withdraw from sale certain chemicals and drugs, even after accepting the winning bid. *See id.* at 630. When the government sued the winning bidder for default, the bidder defended on the ground that the contract was defective for failure of mutuality. *See id.* at 631. The Seventh Circuit affirmed the finding of liability for breach, *see id.* at 633, on the ground that a condition made known to the buyer—even the unilateral right of the seller to withdraw from the contract—did not abrogate the buyer's obligation to perform. *See id.* at 632-33. "If one does not wish to bid . . . with the conditions attached, his alternative is to make no bid." *Id.* at 633.[16]

---

[16] Cases cited by NextWave to support the contrary argument, which concern auctions with reserve, are not on point. *See, e.g.,*

CONCLUSION

We hold that the bankruptcy and district courts had no power to interfere with the FCC's system for allocating spectrum licenses and that, in any event, the courts erred in determining that NextWave's payment obligation was constructively fraudulent. We therefore reverse the judgment of the district court affirming the five orders of the bankruptcy court and remand for further proceedings consistent with this opinion, if any are necessary. The mandate shall issue forthwith.

Erie Coal & Coke Corp. v. United States, 266 U.S. 518, 520-21, 60 Ct. Cl. 1022, 45 S. Ct. 181, 69 L.Ed. 417 (1925); *Ferry v. Udall*, 336 F.2d 706, 709 (9th Cir. 1964).

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Nos. 99 Civ. 4439 (CLB)
Bankruptcy No. 98 B 21529 (ASH)
Adversay No. 98-5178A

IN RE NEXTWAVE PERSONAL COMMUNICATIONS, INC., ET AL., DEBTORS

NEXTWAVE PERSONAL COMMUNICATIONS, INC., PLAINTIFF-APPELLEE

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT-APPELLANT

July 27, 1999

MEMORANDUM & ORDER

BRIEANT, District Judge.

This appeal challenges five decisions and orders of the Bankruptcy Court, issued in a Chapter 11 Proceeding by the Honorable Adlai S. Hardin, United States Bankruptcy Judge, dated December 7, 1998, February 16, 1999, April 2, 1999, May 12, 1999 as supplemented on June 22, 1999, and June 16, 1999, rendered in the Adversary Proceeding of NextWave Personal Communications, Inc. ("NextWave") against the Federal Communications Commission (the "FCC")

(the "Adversary Proceeding"). On June 22, 1999, Defendant-Appellant FCC filed its brief; on July 2, 1999, Plaintiff-Appellee NextWave filed its brief; and on July 8, 1999, the FCC filed its reply brief. On July 15, 1999, this Court heard oral argument on the appeal and reserved decision. Thereafter, on July 20, 1999, NextWave submitted a letter brief addressing certain concerns raised by the Court at oral argument.

Familiarity of the reader with the decisions of Judge Hardin is assumed.

In an appeal of a Bankruptcy Court's decision and order, this Court reviews findings of fact for clear error, *see In re Artha Management, Inc.*, 91 F.3d 326, 328 (2d Cir. 1996), and conclusions of law *de novo*, *see In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 89 (2d Cir. 1992).

FACTUAL BACKGROUND

The facts relevant to this appeal are not disputed significantly. In 1993, after investigation and discussion, the House Committee on Energy and Commerce (the "Committee"), concluded

> that a carefully designed system to obtain competitive bids from competing qualified applicants [for electromagnetic spectrum licenses] can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of public airwaves.

H.R. Rep. No. 103-111 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 580. In response, Congress passed

the 1993 amendments to the Federal Communications Act (the "FCA"), which added section 309(j). *See* 47 U.S.C. § 309(j). Section 309(j) granted the FCC the power to conduct competitive bidding auctions to sell the right to apply for "blocks" of airspace or radiobands. As part of the program, the FCC was to designate certain blocks for auction to small, emerging businesses and to provide flexible, deferred payment plans to such small businesses. *See* 47 U.S.C. § 309(j)(3)(B) and (4)(D). Pursuant to Congress' mandate, the FCC created a competitive bidding auction system and designated the "C Block" for auction to small businesses providing Personal Communication Services ("PCS"), a new form of wireless communication technology. Maximizing revenue was proscribed explicitly as an objective of such system.

On May 6 and July 16, 1996, the FCC ran auctions for C Block licenses at which NextWave won the right to apply for sixty-three C Block licenses by bidding $4.7 billion. NextWave put down the required deposit of $474 million (10% of the winning bid) and proposed a payment plan at below-market interest rates for the remaining $4.26 billion. NextWave submitted applications for the licenses for review and approval by the FCC. On January 3, 1997, the FCC approved NextWave's applications and soon thereafter sent to NextWave a series of promissory notes for a total of $4.26 billion, dated January 3, 1997. NextWave executed the notes on February 19, 1997.

Before approving the C Block licenses for NextWave, the FCC conducted auctions for "D, E & F Block" licenses, resulting in much lower bids for the rights to apply for the same or similar licenses. As a consequence

of the gross disparity between the bids on the C Block licenses and on the D, E and F Block licenses, 90% of the winning bidders from the C Block auction were unable to obtain financing for their payment plans. The FCC thereafter promulgated voluntarily two restructuring orders (the "Restructuring Orders") that offered the C Block license-holders four options to restructure their debt. NextWave informed the FCC that the four options were not commercially viable and on May 8, 1998, requested an alternative restructuring. The FCC refused and NextWave appealed that decision to the Circuit Court of Appeals of the District of Columbia and requested a stay of the June 8, 1998 deadline to elect one of the four options. The Court of Appeals denied the request for a stay.

On June 8, 1998, NextWave, unable to finance its enormous debt to the FCC and severely undercapitalized, declared Chapter 11 Bankruptcy and filed the Adversary Proceeding that is the subject of this appeal.

DISCUSSION

December 7, 1998 Decision Granting in Part and Denying in Part the FCC's Motion to Dismiss

The First Amended Complaint of NextWave contained two claims, the first for constructive fraudulent conveyance subject to avoidance under 11 U.S.C. § 544 and the second for equitable subordination based on the FCC's "inequitable, unconscionable and unfair conduct" in auctioning other licenses before approving all of the C Block licenses. The Bankruptcy Court dismissed NextWave's second claim for lack of subject matter jurisdiction and NextWave has not appealed. Thus, dismissal of that claim is not under review.

The Bankruptcy Court denied the FCC's motion to dismiss NextWave's claim for constructive fraudulent conveyance. The FCC asserted (1) that the Bankruptcy Court and District Court lack subject matter jurisdiction over NextWave's claim because jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the Circuit Courts of Appeals, 28 U.S.C. § 2342; 47 U.S.C. § 402; and (2) that the FCA preempts state fraudulent conveyance claims. The Bankruptcy Court held that for purposes of the fraudulent conveyance claim, the FCC was acting in its capacity as creditor rather than as regulator. As to the preemption claim, the Bankruptcy Court concluded that nothing in the FCA conflicts with a fraudulent conveyance claim or manifests an intent to legislate with respect to debtor-creditor relations or to exclude licensees from access to the Bankruptcy Court.

The Bankruptcy Court reasoned, and this Court agrees, that the fraudulent conveyance claim does not seek to litigate any issue with respect to the regulatory power granted the FCC by Congress. The claim has nothing to do with the FCC's "organization, execution, or implementation" of the radio spectrum auction. Neither does the claim implicate the FCC's power to regulate the issuance or use of spectrum licenses. The claim seeks the equitable remedy of avoidance available under 11 U.S.C. § 544 for the benefit of other creditors and the debtor, and implicates regulations and orders relevant to the FCC only in its role as creditor.

Although Congress has granted the FCC the regulatory power to control the issuance and use of these licenses, it did not grant regulatory power to the FCC to make rules or orders with respect to its own status

as a creditor vis-a-vis its debtors or other creditors of its debtors. The FCA specifically directs that the mandate to the FCC is not to collect revenue, and as the FCC cites in its brief, section 309(j) "alters only the licensing process, and has no effect on the requirements, obligations or privileges of license holders." 1993 U.S.C.C.A.N. at 585. The FCC argues that its powers to direct a debtor to pay the full amount of its debt, regardless of whether the debtor is in bankruptcy, derives from other sections of the FCA. Section 309(j) states, "Nothing in this subjection, or in the use of competitive bidding, shall diminish the authority of the [FCC] under the other provisions of this chapter to regulate or reclaim spectrum licenses." 47 U.S.C. § 309(j)(6)(C). But the FCA does not provide for the FCC's current method of "reclamation" wherein the FCC is attempting "to dictate its own rights as a creditor and thereby confound the rights of other creditors and the debtor established by Congress under the bankruptcy laws." (December 7, 1998 Bankruptcy Decision & Order).

The regulations outlining the steps to be taken by the FCC in the event of a default in payment of the installment notes are provisions of a contract between a creditor and debtor. As such, they are subject to revision and adjustment pursuant to the Bankruptcy Code, just as any similar debt. In any event, NextWave did not default, those steps were never taken, and no penalty was ever assessed.

The Restructuring Orders were the voluntary offers of a creditor to protect the solvency of its debtor in order to assure payment. Not only were these orders promulgated by the FCC in its capacity as a creditor,

but also NextWave is not challenging the propriety of those orders, which provide relief to those who find it commercially viable and desire to take the benefit of such orders. NextWave is challenging the right of the FCC as a creditor of a bankrupt entity to recover on a fraudulently incurred obligation. As the Supreme Court stated in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979),

> When the United States acts as a lender or guarantor, it does so voluntarily, with detailed knowledge of the borrower's financial status. The agencies evaluate the risks associated with each loan, examine the interests of other creditors, chose the security believed necessary to assure payment, and set the terms of every agreement. . . . The Government therefore is in substantially the same position as private lenders, and the special status it seeks is unnecessary to safeguard the public fisc. Moreover, Congress' admonitions to extend loans judicially supports the view that it did not intend to confer special privileges on agencies that enter into the commercial field.

Id. at 736-37, 99 S. Ct. 1448. The regulations and orders noted above were the actions of a creditor who happens to be a federal agency. As a creditor and as a federal agency, the FCC is subject to the Bankruptcy Code. *See* 11 U.S.C. § 106(a) (providing that federal agencies are subject to § 544 claims). Congress could have exempted but did not exempt the FCC from the Bankruptcy Code.

The Bankruptcy Code confers upon the district courts and bankruptcy courts exclusive jurisdiction to administer the Bankruptcy Code and Rules and to

resolve claims, adversary proceedings and contested matters arising under the Code. Specifically, 28 U.S.C. § 157(b)(2)(H) grants the Bankruptcy Court jurisdiction to determine "proceedings to determine, avoid, or recover fraudulent conveyances." The Bankruptcy Court therefore held that the constructive fraudulent conveyance dispute tendered by the Adversary Proceeding was within the subject matter jurisdiction of the Bankruptcy Court, and this Court agrees.

This Court also agrees that the FCA does not preempt the Bankruptcy Code or state fraudulent conveyance law. As this Court has already stated, Congress must expressly exempt federal agencies from application of the Bankruptcy Code and Congress has not exempted the FCC. In addition, the FCA makes absolutely no attempt to regulate debtor-creditor relations.

Section 544 of the Bankruptcy Code provides that the court should use "applicable law" in determining whether a constructive fraudulent conveyance has occurred. Applicable law is generally state law, unless state law is preempted by federal law or state law is found to be inappropriate because of the involvement of the federal government as creditor (*See infra*). With regard to preemption, the FCA provides:

> **State Preemption.** (A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate *the entry of or the rates charged* by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3). This provision does not explicitly preempt state fraudulent conveyance law. Moreover, state fraudulent conveyance law does not actually conflict with the FCA. It may conflict with self-interested regulations promulgated by the FCC in its capacity as a creditor, but those regulations were not promulgated pursuant to the FCA and are not about "frequency allocation, over which federal control is clearly exclusive." *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 430 n.6, 83 S.Ct. 1759, 10 L. Ed. 2d 983 (1963).

February 16, 1999 Decision Determining the "Effective Date"

The FCC brought a motion for summary judgment to determine the "effective date" for purposes of § 544(b) of NextWave's $4.74 billion obligations. Under § 544(b), the "effective date" is the date that the "obligation [was] incurred," § 544(b). The Bankruptcy Court determined that the effective date was at the earliest January 3, 1997, which is the date the FCC approved NextWave's application for the sixty-three C Block licenses and the date of the promissory notes. The FCC argues, however, that the effective date is the date NextWave won the bids at auction on May 8 and July 23, 1996.

The obligation sought to be avoided is not any of the obligations incurred when the auction ended, but rather the obligation to pay the FCC the winning bid amount for the sixty-three licenses, which arose at the time the licenses were issued or the notes were executed. According to the FCC regulations, the winning bidder must apply for the license, which may or may not be granted because the public and other aspirants have the right to oppose the grant. Before the granting of

the application and issuing of the licenses, there is no property to be valued. If the bidder is disqualified or defaults in connection with the application, the FCC may assess a penalty in the amount of the difference between the price ultimately received on resale and the original bidder's bid. Thus, the obligations incurred at auction are the obligations to pay any penalties assessed by the FCC. No penalties were assessed, so that obligation was never incurred. The obligation to pay the total winning bid price is not incurred until the application is processed and granted, and the licenses are thereby transferred to the bidder. Based on this reasoning, the findings of fact by the Bankruptcy Judge that the obligation was not incurred until administrative approval or grant of the licenses, here no earlier than January 3, 1997, is at the very least not clearly erroneous.

April 2, 1999 Oral Decision Denying Dismissal

The FCC moved for judgment on the pleadings for failure to state a claim under federal common law as set out by the Ninth Circuit Court of Appeals in *Kupetz* v. *Wolf*, 845 F.2d 842 (9th Cir. 1988). The FCC argued that because the avoidance claim challenges NextWave's contractual obligation to the United States pursuant to a national statutory scheme for regulating the commercial use of radio spectrum, federal common law should apply. The FCC also argued that the court should apply the *Kupetz* rule of federal common law, that a claim for fraudulent conveyance will not lie if subsequent creditors were on notice of the risks of the conveyance.

On April 2, 1999, the Bankruptcy Court heard oral argument and ruled in an oral decision that it would not

invent federal common law or apply the version presented by the FCC. The Bankruptcy Court reasoned, and this Court agrees, that federal common law is applied where application of existing state or federal law would undermine a federal regulatory program. *See United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 604, 93 S. Ct. 2389, 37 L. Ed. 2d 187 (1973) ("[S]tate law may be found an acceptable choice, . . . even when the United States is a contracting party. However, in a setting in which the rights of the United States are at issue in a contract to which it is a party and the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that program."). In this case, the application of 11 U.S.C. § 544(b) and thereby state fraudulent conveyance law will not abrogate the explicit terms or purposes of the regulatory scheme embodied in Section 309(j) or other sections of the FCA.

This Court also agrees that even if the Bankruptcy Court had concluded that the "applicable law" is federal common law, the rule articulated in *Kupetz* is not the proper federal common law to apply to this case. The great majority of the creditors in this case extended credit before the auction, and before the licenses were issued and the allegedly fraudulent obligation was incurred. Therefore, NextWave's other creditors are not subsequent creditors with notice comparable to the creditors in *Kupetz*.

May 12 and June 22, 1999 Findings of Fact and Conclusions of Law After Trial

In the May 12 opinion, the Bankruptcy Court determined that the material elements of a fraudulent conveyance claim are the same under any law which

could apply, that is, California law, New York law, District of Columbia law, and the Bankruptcy Code § 548. Applying those elements, the Bankruptcy Court found after trial that NextWave had proved its claim for constructive fraudulent conveyance. In the June 22 supplemental opinion, the Bankruptcy Court granted the remedy provided by § 544, that is, avoidance to the extent allowed under applicable law. The Bankruptcy Court determined under California law that the obligation was incurred on February 19, 1997, the date the notes were executed and went into effect. On that date, the C Block licenses were worth $1,023,211,000. All obligations beyond this amount were represented by the payments and notes held to be fraudulently conveyed. Thus, NextWave's non-fraudulent obligation was held to be $1,023,211,000. NextWave is thus currently obligated to pay $1,023,211,000 minus the amount paid as downpayment, $474,364,806, leaving a total current obligation of $548,846,194.

Other than its argument that the Bankruptcy Court should apply federal common law, which the Bankruptcy Court rejected in its April 2, 1999 Oral Decision, the FCC does not dispute the material elements of a fraudulent conveyance claim applied by the Bankruptcy Court to the facts determined at trial. This Court addressed and rejected this argument in its discussion of the April 2, 1999 Oral Decision and need not revisit it in the context of the Bankruptcy Court's Findings of Fact and Conclusions of Law after trial. The uncontested elements are as follows: NextWave must prove that (1) it incurred an obligation (2) at a time when it was engaged or was about to engage in a business or transaction for which the remaining assets of NextWave were unreasonably small in relation to the

business or transaction, or intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due (3) for which it did not receive reasonably equivalent value.

Other than its argument that the Bankruptcy Court should find that the effective date was the date of the auction, which the Bankruptcy Court rejected in its February 16, 1999 Summary Judgment Decision, the FCC does not contest the Bankruptcy Court's finding that NextWave incurred an obligation on February 19, 1997.[1] Again, this Court addressed and rejected this argument in its discussion of the February 16, 1999 Summary Judgment Decision and need not revisit it in the context of the Bankruptcy Court's Findings of Fact and Conclusions of Law after trial.

The FCC stipulated before trial to the second element of the claim that NextWave was insolvent on January 3 and February 14 and 19, 1997, and on June 8, 1998. The FCC does not contest the valuation of the licenses as of February 19, 1997, or the resultant conclusion that NextWave did not receive reasonably equivalent value for the obligation incurred. Thus, in challenging the Bankruptcy Court's Findings of Fact and Conclusions of Law, the FCC is really challenging only the remedy imposed by the Bankruptcy Court.

The FCC argues that the Bankruptcy Court in fashioning its remedy failed to harmonize the FCA with the Bankruptcy Code because it "failed to recognize that the potential benefits of allowing NextWave to

---

[1] There seems to be no material difference in the value of the licenses if the date of January 3, 1997 were to be used.

reorganize pale in comparison with the negative ramifications that follow from permitting spectrum licensees to avoid critical provisions of their regulatory agreements with the FCC by declaring bankruptcy." (Brief of Defendant-Appellant). The FCC asserts that allowing NextWave to keep the sixty-three licenses for a reduced obligation undermines the integrity, reliability and purpose of the regulatory scheme for competitive bidding, creates perverse incentives for bidders to bid to win while never intending to pay the bid but rather intending to go into bankruptcy after the auction, and hurts those who bid for but did not win the licenses when they were willing to pay much more than NextWave is now obligated to pay.

It is true that the Bankruptcy Court was required to balance the two enactments and "give effect to both if possible." *Morton* v. *Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). It is also true that the Bankruptcy Court did just that. The Bankruptcy Court spent three pages of its opinion delineating how its chosen remedy would fulfill the objectives of the Bankruptcy Code and § 309(j) of the FCA. This Court agrees that the remedy that best balances the objectives of the Bankruptcy Code and the FCA is avoidance of so much of the obligation as was fraudulently conveyed.

Section 544 provides specifically for the remedy of avoidance for a fraudulent conveyance: "The trustee may avoid . . . any obligation incurred by the debtor that is voidable under applicable law." 11 U.S.C. § 544(b). Although the entire obligation is voidable, *In re Acequia, Inc.*, 34 F.3d 800, 809-10 (9th Cir. 1994), the good faith obligee has the right to assert a claim for the

value of the property transferred: "[T]o the extent a[n] . . . obligation is voidable under section 544 . . . a[n] obligee . . . that takes for value and in good faith . . . may enforce any obligation incurred . . . to the extent that such . . . obligee gave value to the debtor in exchange for such . . . obligation." 11 U.S.C. § 548(c). If NextWave were required to return the licenses, the Company would be forced into dissolution. The remedy of avoidance of only the portion of the obligation that was fraudulently incurred is the statutory remedy and such remedy promotes equitable distribution among creditors and other parties by returning fraudulently transferred property to the estate and fosters the overall bankruptcy policy favoring reorganization over dissolution. *See In re Chateaugay Corp.*, 89 F.3d 942, 949 (2d Cir. 1996) (noting policy favoring rehabilitation and reorganization evidenced by Bankruptcy Code and affirming 201 B.R. 48, 72 (Bankr. S.D.N.Y. 1996) ("Public Policy, as evidenced by chapter 11 of the Bankruptcy Code, strongly favors the reorganization and rehabilitation of troubled companies and concomitant preservation of jobs and going concern values.")); *see also In re Continental Airlines*, 91 F.3d 553, 565 (3d Cir. 1996) (noting same policy).

The objectives of Congress in enacting § 309(j) are the development and rapid deployment of new technology for the benefit of the public, the promotion of competition to ensure the efficient and intensive use of the spectrum, the provision of opportunity for small businesses to enter the field, and the recovery for the public of a portion of the value of the spectrum. *See* 47 U.S.C. § 309(j)(3). The remedy fashioned by the Bankruptcy Court supports these objectives. NextWave has invested millions of dollars in researching new

technology and preparing a network that can utilize best the licenses it has. It is a small, innovative business with employees and small creditors as well as large creditors like the FCC. Allowing NextWave to keep and use the licenses promotes rapid deployment of technology without the delay of reauction and development of a new network by another company. It promotes small business entering a field with high barriers to entry. It allows the public to recover more than a portion of the current value of the spectrum licenses; the public is recovering more than two times the current value of the spectrum licenses.

Also, Congress made clear that maximizing revenue cannot be an objective. The FCC is recovering more than the value of the spectrum and should not now be trying to maximize revenue by trying to recover the winning bid.

The remedy fashioned by the Bankruptcy Court at the same time does not undermine the objectives of § 309(j). The FCC's assertions to the contrary are not persuasive. First, a company generally does not intend to jump into bankruptcy as part of its business plan. Bankruptcy is bad business. It is a laborious process in which reorganization is not always possible and the company's reputation may be destroyed. When and if a hypothetical bidder that would bid without intending to perform comes on the scene, the Bankruptcy Court as a court of equity can deal with the problem. This is not such a case, and the wisdom and propriety of the remedy must be reviewed in light of the facts of the actual case before Judge Hardin.

Second, the Bankruptcy Court found, and the FCC does not contest, that

> NextWave was not the only C block licensee to find the public capital markets closed. Approximately $1.6 billion of public financing was sought by C block licensees after the award of their licenses. Not one dollar of this $1.6 billion was raised in the public market. To this date, nearly three years after the 1996 auction and reauction, less than 10% of the C block licenses awarded by the FCC have been placed in service.

(May 12, 1999 Bankruptcy Decision). Thus, the C Block auction was a disaster for every participant. Those who bid but did not win are lucky, not hurt. They had the opportunity to bid at the D, E and F Block auctions and receive equivalent licenses for a fraction of the price NextWave is paying, even after the decision reducing its obligation. And if they had won the bid at the C Block auction, likely they would be in bankruptcy right now. The integrity and reliability of the C Block auction is not undermined by an avoidance remedy; it was undermined by the fact that 90% of the winning bidders are now bankrupt and/or paying an outrageously inflated price. The FCC has not since run another auction like the C Block auction.

The Court thus agrees that the remedy fashioned by the Bankruptcy Court "is intuitively fair and equitable to both the government and the debtor's estate and implements both the letter and spirit of the Federal and state statutes and the case law governing debtor-creditor relations." (June 22, 1999 Bankruptcy Supplemental Decision). In addition, the remedy supports rather than

undermines the objectives of the FCA, particularly § 309(j).

June 16, 1999 Decision Denying Motion to Lift Automatic Stay

The Bankruptcy Court denied the FCC's motion to lift the automatic stay under 11 U.S.C. § 362(d)(1) for "cause." The FCC's asserted "cause" for a lift of the automatic stay was that by reason of the May 12 and June 22 opinions, NextWave would not be paying the full amount of its winning bids in the C Block auction, and thus would be defaulting. According to the FCC, the FCC therefore should be able to pursue the remedy set out in its regulations, that is, return of the licenses and foreclosure on the $4.26 billion allegedly outstanding. The FCC asserts that the automatic revocation of licenses and pursuit of debt collection procedures upon default are "mandated" by FCC regulations on the auction process and it should be allowed to proceed.

The FCC fails to present cause for a lift of the automatic stay. As this Court has stated previously, he FCC regulations on automatic revocation and pursuit of debt collection are not part of the auction process; they are the FCC's rules governing its status as a creditor of licensees. Congress did not exempt the FCC from the Bankruptcy Code or grant the FCC the power to determine debtor-creditor relations. As such, the FCC is to be treated in this context as any other creditor. At present, NextWave's obligation has been reduced and it is not in default on the reduced obligation. There is no reason to believe that it will default. Indeed, it is highly likely that the debtor will confirm a plan of reorganization and will stay in business, putting the sixty-three

licenses at issue in this case to good use for the benefit of creditors, employees, and the public at large. This fulfills the primary objective of the Bankruptcy Code to rehabilitate debtors for the benefit of all. *See In re Chateaugay Corp.*, 89 F.3d at 949, 201 B.R. at 72 ("Public Policy, as evidenced by chapter 11 of the Bankruptcy Code, strongly favors the reorganization and rehabilitation of troubled companies and concomitant preservation of jobs and going concern values.").

CONCLUSION

For the foregoing reasons, the decisions and orders of the Bankruptcy Court in the Adversary Proceeding are affirmed.

SO ORDERED.

Supreme Court, U.S.
FILED
OCT 19 2001

01 658

No.

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC. AND NEXTWAVE POWER PARTNERS INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI (VOLUME II)

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY A. LAMKEN
Assistant to the Solicitor General

WILLIAM KANTER
JACOB M. LEWIS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOHN A. ROGOVIN
Deputy General Counsel

DANIEL M. ARMSTRONG
JOEL MARCUS
Counsel
Federal Communications Commission
Washington, D.C. 20507

TABLE OF CONTENTS
(Volume I)

	Page
Appendix A (Opinion of the D.C. Circuit, 254 F.3d 130 (June 22, 2001))	1a
Appendix B (Reconsideration Order of the Federal Communications Commission, 15 FCC Rcd 17,500 (Sept. 6, 2000))	52a
Appendix C (Public Notice of the Federal Communications Commission, 15 FCC Rcd 693 (Jan. 12, 2000))	96a
Appendix D (Opinion of the Second Circuit on Mandamus, 217 F.3d 125 (May 25, 2000))	102a
Appendix E (Opinion of the Bankruptcy Court, 244 B.R. 253 (S.D.N.Y. Jan. 31, 2000))	134a
Appendix F (Opinion of the Second Circuit, 200 F.3d 43 (Dec. 22, 1999))	213a
Appendix G (Opinion of the District Court, 241 B.R. 311 (S.D.N.Y. July 27, 1999))	254a
(Volume II)	
Appendix H (Opinion of the Bankruptcy Court, 235 B.R. 305 (S.D.N.Y. June 22, 1999))	273a
Appendix I (Opinion of the Bankruptcy Court, 235 B.R. 314 (S.D.N.Y. June 16, 1999))	293a
Appendix J (Opinion of the Bankruptcy Court, 235 B.R. 277 (S.D.N.Y. May 12, 1999))	301a
Appendix K (Opinion of the Bankruptcy Court, 235 B.R. 272 (S.D.N.Y. Feb. 16, 1999))	359a
Appendix L (Opinion of the Bankruptcy Court, 235 B.R. 263 (S.D.N.Y. Dec. 7, 1998))	369a
Appendix M (Radio Station Authorization (FCC issued Jan. 3, 1997))	387a

Table of Contents—Continued

	Page
Appendix N (Installment Payment Plan Note (dated Jan. 3, 1997))	389a
Appendix O (Security Agreement Between NextWave Personal Communications, Inc. and the Federal Communications Commission (dated Jan. 3, 1997))	401a
Appendix P (Statutory and Regulatory Provision):	
11 U.S.C. 362 (2000)	417a
11 U.S.C. 525 (2000)	427a
28 U.S.C. 1334	429a
47 U.S.C. 309(j) (1994)	431a
47 U.S.C. 309(j) (2000)	448a
47 C.F.R. 1.2110 (1997)	470a
47 C.F.R. 1.2110 (1998)	482a

APPENDIX H

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Bankruptcy No. 98 B 21529(ASH)
Adversary No. 98-5178A

IN RE NEXTWAVE PERSONAL COMMUNICATIONS, INC., ET AL., DEBTORS

NEXTWAVE PERSONAL COMMUNICATIONS, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

June 22, 1999

DECISION ON REMEDY

ADLAI S. HARDIN, JR., Bankruptcy Judge.

On May 12, 1999 this Court issued its decision (the "May 12 Decision") after trial on the merits of the constructive fraudulent conveyance claim asserted by plaintiff-debtor NextWave Personal Communications, Inc. ("NPCI") against defendant Federal Communications Commission ("FCC"). The Court left open the question of remedy and sought further illumination of the parties' positions in light of the ruling on the merits.

To avoid unnecessary repetition, this Decision on Remedy shall be deemed a supplement to and a part of

the May 12 Decision. Having ruled on the issue at the May 26 hearing on remedy and signed an order and judgment granting the remedy sought by NPCI, the purpose of this Decision is to set forth the grounds for the ruling.

Positions of the Parties

NPCI

NPCI's position is based upon the words of the statute. Section 544 of the Bankruptcy Code, upon which the claim is based, states that "[t]he trustee may avoid . . . any obligation incurred by the debtor that is voidable under applicable law. . . ." NPCI points out that, unlike other provisions of the Bankruptcy Code (*e.g.*, Sections 106(a)(2), (3), 305(a), 1109(b)), which provide that the "court may" or a "party in interest may" do thus and so, the election to avoid a constructively fraudulent transfer is specifically delegated to "the trustee." As debtor-in-possession with all the rights of a trustee under Section 1107, NPCI has requested and states that it is entitled to the avoidance remedy provided by the statute. In addition, NPCI argues that the avoidance remedy is consistent with the objectives of both the Bankruptcy Code and Section 309(j) of the Federal Communications Act. Referring to the overarching bankruptcy policy favoring reorganization, NPCI stresses that avoidance of the obligation is vital to NPCI's reorganization.

The literal terms of Section 544 (as well as Section 548 and California Civil Code § 3439.07) appear to call for avoidance of the entire obligation where the statutory criteria for avoidance are met. Recognizing that avoidance of the entire obligation would be inappropriate in many cases, particularly where a constructively fraudulent transaction is at issue and the claim is not based upon any element of bad faith on the part of the obligee, NPCI asserts that the FCC should be entitled to a claim in the amount of $1,023,211,000 representing the value conferred as found in the May 12 Decision. NPCI has already paid $474,364,806, leaving a balance due of $548,846,194 to be paid in accordance with the installment provisions of the FCC regulations.

As a practical matter this remedy results in avoidance of the $3,720,437,000 portion (the "Fraudulently Incurred Obligation") of NPCI's total bids for its 63 C block licenses which exceeded the combined value of those licenses and the 3% Payment.

FCC

In its Supplemental Memorandum of Law Regarding Remedy, the FCC observes that this case arises at the intersection of the Bankruptcy Code and the Federal Communications Act, and that this Court must give effect to both statutes if possible. To this end, the FCC asserts that:

> [T]he Court must honor two essential principles: (1) as between debtor [NextWave] and the FCC, the entire $4.74 billion C block payment obligation remains valid and is only partially avoidable to the extent necessary to benefit NextWave's *bona fide* creditors; and (2) NextWave cannot retain its 63 C block licenses without satisfying its auction bids in full.

FCC Memo on Remedy at 2. To accomplish these objectives, the FCC concludes its Memorandum on Remedy by asserting that the Court should:

> . . . (1) order NextWave to surrender its 63 C block licenses to the FCC; (2) allow the FCC to retain all of NextWave's down payments in partial satisfaction of its unavoidable claim, or, in the alternative, to retain $142,309,000 in down payments, direct that the remaining $332,055,806 in down payments be paid to NextWave's estate, and permit the FCC to file an unsecured claim against NextWave's estate for any deficiency in its recovery of $1,023,211,000; and (3) subordinate the FCC's claim for the [Fraudulently Incurred Obligation] to the general unsecured claims.

Id. at 13.

Unsure of the meaning and purpose of the FCC's remedial objectives, the Court requested clarification of its position at the May 26 hearing. In explaining its primary objective, the FCC acknowledged or stated among other things:

- Money is not the end goal. . . . Money is not the objective. (5/26/99 Tr. At 30)
- The objective is "[a] fair and efficient allocation of the limited resource of radio spectrum." (*Id.* at 31)
- "The bid amount, as I said, is what ties the whole process back to the statute and brings it to the heart of the regulatory purpose of congress in adopting a competitive bidding system to allocate the limited resources spectrum. It is the bid amount which drives the industry from the prospective [sic] of allocation spectrum. . . . And the FCC . . . has determined that the bid price is paramount to achieve those ends." (*Id.* at 31-32)

Still uncertain of the FCC's primary objective and theory of remedy, the Court asked whether the FCC would seek rescission (*i.e.*, return to the FCC of the 63 licenses and return to NPCI of the $473 million of deposits) as an alternative if the remedy proposed by the FCC were rejected. The FCC responded that its paramount interest is in getting the licenses back, but stressed to the Court that rescission is "not what we seek" (*id.* at 29).

In short, the FCC wants to recover the 63 licenses, keep the $473 million of deposits or, in the alternative, keep the $142,309,000 3% Payment and an unsubordinated "deficiency claim" (*i.e.*, $1,023,211,000 less $142,309,000 less whatever the FCC may receive from its resale of the licenses) and, in addition, retain an allowed claim in NPCI's Chapter 11 case for the entire $3.7 billion Fraudulently Incurred Obligation subordinated to existing, but not future, unsecured creditors and, of course, senior to equity both old and new. Not surprisingly, the FCC cites to no case law supporting this astonishing and novel remedy for constructive fraudulent conveyance, and for the reasons discussed below the Court sees no reason to grant it.

Governing Legal Authorities

This Court's fashioning of a remedy is guided by the canon that statutory interpretation begins with the

language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S. Ct. 2297, 85 L.Ed.2d 692 (1985). *See also United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-42, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989) (a statutory provision that is clear on its face should be given full force and effect); *Central Trust Co. v. Official Creditors' of Geiger Enterprises, Inc.*, 454 U.S. 354, 359-60, 102 S. Ct. 695, 70 L.Ed.2d 542 (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L.Ed. 442 (1917)) ("[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms").

Section 544(b) of the Bankruptcy Code provides: "The trustee may avoid . . . any obligation incurred by the debtor that is voidable under applicable law. . . ." Section 544(b) incorporates non-bankruptcy law to supplement the trustee's avoiding powers under the Bankruptcy Code. The avoidance powers are intended to promote equitable distribution among creditors by bringing improperly transferred property back into the debtor's estate. *In re Best Products Co., Inc.*, 168 B.R. 35, 57 (Bankr. S.D.N.Y. 1994) ("[f]raudulent transfer laws are intended to promote payment to creditors"). Specifically, Section 544(b) allows the trustee or debtor-in-possession in a case under Chapter 11 to invoke the rights of an existing unsecured creditor to set aside a transaction that is voidable under applicable state law.

An essential element in the exercise of the avoidance powers in Section 544 *et seq.* of the Bankruptcy Code is that the remedy be "for the benefit of *the estate*."

11 U.S.C. § 550(a), emphasis supplied. Section 550 thereby places an equitable restraint on the exercise of avoiding powers. The "estate" comprises all interests, including all creditors and equity. Thus, it might be inappropriate to use the avoiding powers if the benefit accrued only to the equity or to only one creditor or one class of creditors. Under the "benefit of the estate" standard, "what matters is whether creditors will receive 'some benefit from the recovery of the [challenged transfers].'" *In re Kennedy Inn Associates*, 221 B.R. 704, 715 (Bankr. S.D.N.Y. 1998) quoting from *In re Centennial Industries, Inc.*, 12 B.R. 99, 102 (Bankr. S.D.N.Y. 1981). *See also In re Glanz*, 205 B.R. 750, 758 (proper standard is "that recovery by [the debtor] will increase [the debtor's] assets and improve its financial health to the extent that the likelihood is improved of its being able to satisfy its obligations to its creditors under [a] Plan").

Recovery of the avoided transfer is appropriate even if the benefit to the estate is indirect. 5 *Collier on Bankruptcy* ¶ 550.02[2], p. 550-7 (15th ed. 1998). The term "estate" is broader than the term "creditors," *In re Trans World Airlines, Inc.*, 163 B.R. 964, 972 (Bankr. D. Del. 1994), and benefit has been interpreted broadly to include an indirect benefit such as an increase in the probability of a successful reorganization. *See, In re Tennessee Wheel & Rubber Co.* (*Tennessee Wheel & Rubber Co. v. Captron Corp. Air Fleet*), 64 B.R. 721, 725-26 (Bankr. M.D. Tenn. 1986), *aff'd*, 75 B.R. 1 (M.D. Tenn. 1987); *In re Sweetwater*, 884 F.2d 1323, 1326-7 (10th Cir. 1989) (the Tenth Circuit found that if the estate representative appointed pursuant to section 1123(b)(3)(B) realized more cash from the fund's assets than the allowed amount of administrative claims, the

remainder would go to the reorganized debtor, which would then be in a better position to meet its financial commitments, if any, under the plan); *In re Acequia, Inc.*, 34 F.3d 800, 811-12 (9th Cir. 1994) (allowing recovery of fraudulent transfers even though unsecured creditors have been paid in full when recovery would aid continuing performance of post confirmation obligations and reimburse the bankruptcy estate for fraudulent conveyance litigation costs); *In re Trans World Airlines, Inc.*, 163 B.R. at 973 ("basic purpose of recovery pursuant to § 550(a) is to enlarge the estate for the benefit of creditors . . . whether any of it is distributed is a function of the conduct of the case and the negotiations of the plan of reorganization"); *In re Centennial Industries, Inc.*, 12 B.R. at 102 (recovery sufficient so long as unsecured creditors received some benefit from the recovery of the preferences, even if it was not an increase in the amount they would receive).

Section 544(b)'s avoidance remedy fosters the overall bankruptcy policy favoring reorganization. *In re Chateaugay Corp.*, 201 B.R. 48, 72 (Bankr. S.D.N.Y. 1996), *aff'd in part*, 213 B.R. 633 (S.D.N.Y. 1997) ("[p]ublic policy, as evidenced by chapter 11 of the Bankruptcy Code, strongly favors the reorganization and rehabilitation of troubled companies and concomitant preservation of jobs and going concern values"); *In re Paris Indus., Corp.*, 106 B.R. 339, 341 (Bankr. D. Me. 1989) ("The Bankruptcy Code embodies a governmental policy favoring reorganization and a fresh start"); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527, 528, 104 S. Ct. 1188, 79 L.Ed.2d 482 (1984) ("policy of Chapter 11 is to permit successful rehabilitation of debtors . . . fundamental purpose of reorganization is to prevent a debtor from going into liquidation").

Contrary to the FCC's position that avoidance be limited to the extent of the claims of existing creditors, it is well settled that once an obligation is deemed voidable the entire transfer is avoided to the extent necessary to benefit the estate, without regard to the size of the claims of the existing creditors whose rights and powers the debtor-in-possession is asserting. *See* 5 *Collier on Bankruptcy* ¶ 544.09[5], p. 544-21 (15th ed. 1998) (discussing *Moore v. Bay*, 284 U.S. 4, 52 S. Ct. 3, 76 L.Ed. 133 (1931)). Under Section 544(b) "if the transfer is avoidable at all by any creditor, it is avoidable in full for all creditors regardless of the dollar amount of the prevailing claim." *In re Acequia, Inc.*, 34 F.3d at 810 (quoting *Abramson v. Boedeker*, 379 F.2d 741, 748 n.16 (5th Cir.), *cert. denied*, 389 U.S. 1006, 88 S. Ct. 563, 19 L.Ed.2d 602 (1967)). *See also*, *In re Theisen*, 45 B.R. 122, 126-27 (Bankr. D. Minn. 1984) ("[O]nce avoidability is determined under state law, the transfer is entirely avoidable by a trustee in bankruptcy regardless of the amount of the creditor's claim relied upon by the trustee," discussing *Moore v. Bay* doctrine).

In this case, the appropriate remedy is avoidance of the entire obligation and reinstatement of the obligation to the extent of value given. While the literal terms of the applicable statutes (Section 544(b) of the Bankruptcy Code, which incorporates Cal. Civ. Code § 3439.04) and the case law provide for avoidance of the entire obligation, both bodies of law also offer protection to a good faith obligee. Section 548(c) of the Bankruptcy Code provides in pertinent part:

> to the extent that a[n] . . . obligation . . . is voidable under section 544 . . . a[n] obligee of such . . . obligation that takes for value and in good faith . . .

> may enforce any obligation incurred . . . to the extent that such . . . obligee gave value to the debtor in exchange for such . . . obligation.

11 U.S.C. § 548(c). California's Uniform Fraudulent Transfer Act contains a similar provision.[1] Cal. Civ. Code § 3439.08(d) states:

> Notwithstanding voidability of . . . an obligation. . . . a good faith . . . obligee is entitled, to the extent of value given the debtor for the . . . obligation, to . . . enforcement of any obligation incurred.

Thus, when an obligation is avoided under Section 544(b) of the Bankruptcy Code, both statutes entitle the obligee to enforce the obligation to the extent of value given the debtor. Recognizing yet another canon of statutory construction, namely "that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it," the proper remedy lies in Section 548(c) of the Bankruptcy Code. *See In re Granite Partners, L.P.*, 208 B.R. 332, 341 (Bankr. S.D.N.Y. 1997) (discussing restriction of remedial provisions of securities laws as interpretive analogies to Bankruptcy Code Section 510(b), citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 574, 99 S. Ct. 2479, 61 L.Ed.2d 82 (1979) and quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S. Ct. 242, 62 L.Ed.2d 146 (1979)); *see also Patterson v. Shumate*, 504 U.S. 753, 759, 112 S. Ct. 2242, 119 L.Ed.2d 519 (1992) (statute must be enforced

---

[1] The legislative committee comment to Cal. Civ. Code § 3439.08(d) acknowledges that the statute was adapted from Section 548(c) of the Bankruptcy Code.

according to its terms) and *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989) (plain meaning of statute governs unless demonstrably at odds with drafters' intent). Accordingly, the FCC has a valid claim that is enforceable to the extent of value given the debtor, less the sum already paid by the debtor.

The case law is consistent with the remedy expressed on the face of Section 548(c). *See, In re Telesphere Communications, Inc.*, 179 B.R. 544, 559 (Bankr. N.D. Ill. 1994) (lenders entitled to enforce their obligation to the extent of value given [the debtor]); *In re Wes Dor, Inc.*, 996 F.2d 237, 243 (10th Cir. 1993) (finding transferee liable for amount of transfer minus value extended to the debtor); *Covey v. Commercial Nat'l Bank of Peoria*, 960 F.2d 657, 662 (7th Cir. 1992) (avoiding subsidiary's guarantee of parent's debt in excess of value given to the subsidiary).

Conclusions on Remedy

While NPCI urges the Court to apply Section 544 as written, the FCC urges the Court to use "remedial flexibility." Since Section 544(b) is clear on its face and under the case law, the Court will apply the statute as written, mindful of the Supreme Court admonition that statutes should be enforced as written. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. at 240-42, 109 S. Ct. 1026 and *Patterson v. Shumate*, 504 U.S. at 759, 112 S. Ct. 2242.

The statutory remedy is avoidance of the entire obligation upon a finding of fraudulent conveyance. *See In re Acequia, Inc.*, 34 F.3d at 809-10 ("[a] transaction that is voidable . . . may be avoided in its entirety").

However, the FCC may enforce NPCI's obligation to the extent it provided value to the debtor's estate. Stated differently, only the Fraudulently Incurred Obligation will be avoided.

The purported "remedy" urged upon the Court by the FCC in this fraudulent conveyance proceeding exhibits "remedial flexibility" to such an extent that it barely merits discussion. In the face of a statute of Congress intended to rectify inequities among creditors and facilitate reorganization of debtors, and despite this Court's finding of fact after trial that NPCI's indebtedness to the FCC was roughly five times the value of the C block licenses when conveyed, the FCC has proposed as a "remedy" that it should reclaim the licenses and, at the same time, retain all or a substantial portion of the $473 million paid by NPCI for the licenses and retain a claim in NPCI's bankruptcy for the $3.7 billion Fraudulently Incurred Obligation subordinated only to existing unsecured debt. Such a decree would reduce the value conveyed by the FCC to NPCI from $1.023 billion to zero ($0.00) while allowing the FCC to retain up to $473 million of the debtor's money and a subordinated claim for $3.7 billion. It would render NPCI hopelessly insolvent and result in prompt conversion to Chapter 7 and liquidation of this debtor.

The utter irrationality of the FCC's proposed remedy is manifest from the fact that, if the FCC reclaims the licenses, every dollar of cash and every dollar of allowed claim retained by the FCC would itself automatically become a fraudulent conveyance, since the licenses constituted the FCC's only contribution to NPCI in exchange for its cash and debt obligation. In other words, the FCC asks the Court not to rectify but to

compound the constructive fraudulent conveyance already adjudicated by ordering the debtor to return the entire value received from the FCC while allowing the FCC to retain much of what the debtor paid for that value.

The remedy proposed by NPCI and adopted by this Court is intuitively fair and equitable to both the government and the debtor's estate and implements both the letter and the spirit of the Federal and state statutes and the case law governing debtor-creditor relations. The FCC will retain an obligation for the full value of the consideration which it conveyed to the debtor. The avoidance remedy fully comports with the "benefit of the estate" standard of Section 550(a) in that the debtor's estate will be relieved of that portion of its financial obligation to the FCC for which it received no value and will be able to proceed promptly with a viable plan of reorganization, having access to the public financial markets which was precluded by reason of the $3.7 billion Fraudulently Incurred Obligation not backed by any asset value.

Although eschewed by the FCC, a more rational alternative to the avoidance remedy proposed by the debtor would be traditional rescission, which would achieve the FCC's purported primary objective of cancellation and return of the 63 C block licenses for reauction while returning the cash deposits to NPCI and cancelling all debt to the FCC. But avoidance, not rescission, is the remedy mandated by the Bankruptcy Code. Moreover, the "benefit of the estate" test and the overarching policy of the bankruptcy laws favoring reorganization both weigh heavily in favor of the avoidance remedy, since the likelihood of a successful

reorganization of NPCI appears to be high with the 63 C block licenses, and virtually nil without them.

The avoidance remedy is also far more consonant with the statutory objectives expressed in Section 309(j) of the Federal Communications Act than rescission. Under Section 309(j) the FCC was charged with achieving four clearly expressed objectives: (1) the development and rapid deployment of new wireless technology for the benefit of the public without administrative or judicial delays; (2) promotion of economic opportunity and competition by disseminating licenses among a wide variety of applicants including entrepreneurial, small businesses; (3) recovery for the public of a portion of the value of radio spectrum; and (4) the efficient and intensive use of spectrum. 47 U.S.C. § 309(j)(3). Each of these statutory policy objectives is advanced by the avoidance remedy and inhibited by rescission.

First, rescission and cancellation of NPCI's 63 C block licenses would result in lengthy and indeterminate delay in the deployment and use of those licenses. Even if there were no appeal from this Decision by either party, there can be no assurance when or whether the FCC would reauction the licenses, and it is unlikely that any reauction would be commenced in less than eight or nine months, judging from the 1999 reauction. Any reauction could be expected to take three to four months, as in the case of past auctions, and the license approval process for the successful bidder(s) could be expected to take up to five months particularly in the event of a third-party challenge, as in the case of NextWave. Thus, a delay of twelve to eighteen months or possibly substantially more would be the likely result

of rescission, which is significant in the highly competitive and rapidly moving wireless telecommunications industry.

Second, NPCI and its NextWave affiliates are not only qualified under Section 309(j) as entrepreneurial designated entities to hold C and F block licenses, but as the largest holder of PCS spectrum in the C/D/E/F blocks NextWave undoubtedly would constitute the only potential candidate to compete with the major players such as AT & T, Sprint and NextTel which the FCC's trial expert, Dr. Salant, viewed as a prime objective of the C block auction. If NPCI's 63 C block licenses were cancelled and reauctioned, there can be no assurance that NextWave or any single bidder would succeed in winning all or most of the 63 licenses, or that the FCC would award the licenses to NextWave if it were the successful bidder. Moreover, NextWave's "carrier's carrier" business strategy could provide potential access to PCS spectrum for a variety of resellers of wireless services and thereby "promot[e] . . . economic opportunity and competition by disseminating licenses among a wide variety of applicants including small businesses." 47 U.S.C. § 309(j)(3).

Third, although Section 309(j) charges the FCC only "to recover a portion of the value of the licenses for the public" (emphasis supplied), the avoidance remedy will recover for the public fisc $1.023 billion, which exceeds the full value of the 63 C block licenses ($908 million) as of February 1997. It would appear that this far exceeds the present fair market value of the 63 C block licenses, judging by the values achieved in the 1999 reauction of predominantly C block licenses.

Finally, the avoidance remedy will promote, the prompt, efficient and intensive use of PCS spectrum. Less than ten percent of the original C block licenses are currently in use. NPCI represents that it has conducted extensive site planning and/or radio frequency design in many of the markets covered by its C block licenses and has successfully installed PCS network equipment in trial systems in San Diego, San Antonio, Washington, D.C. and Las Vegas. As purportedly the only wireless provider dedicated to the wholesale "carrier's carrier" strategy, NPCI asserts that it will create competitive opportunities that do not exist in the wireless marketplace today, and may not exist in the event of rescission and reauction.

As to the FCC's subordination and "benefit to creditors" argument, *In re Best Products, Inc.*, 168 B.R. 35, 57 (Bankr. S.D.N.Y.), *aff'd*, 68 F.3d 26 (2d Cir. 1995) and *In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 288 (Bankr. S.D.N.Y. 1990), cited in support of the FCC's contention that the $3.7 billion Fraudulently Incurred Obligation should be merely subordinated to existing unsecured creditors, rather than avoided, are conceptually inapposite. Both cases involved proceedings seeking to confirm reorganization plans and, in that context, approval of settlements of putative but unasserted fraudulent transfer claims against lenders arising out of leveraged buy-out ("LBO") transactions involving the debtor. Regarding remedy, one court recognized that "[o]ne of the murkiest areas of fraudulent transfer law as applied to LBOs is what remedy to apply when the plaintiff prevails." *Best Products*, 168 B.R. at 57. In both *Best Products* and *Crowthers McCall* the lenders in question made loans to the respective debtors and took back promissory notes in

precisely the amount of the consideration furnished by the lenders to the debtors, *i.e.*, the loans. The fraudulent transfer theory which might have been asserted against these lenders, and which was compromised in the context of the reorganization plans, was that the loans in question were merely steps in a series of transactions in connection with the LBOs by which the new shareholders, in effect, appropriated the loan proceeds to acquire the debtors' equity for their own personal benefit, thereby depriving the debtors and the debtors' other creditors of the economic benefits of the loans. The inherently "inside" nature of these LBO transactions generates a split of interest within the "estate" between the acquiring equity interest and their lender-funders versus the debtor's existing or "old" creditors. In such a context, it is not surprising that both courts would have employed language to the effect that the fraudulent transfer remedy, if any, should benefit the debtors' creditors, but that the indebtedness should be enforced vis-a-vis the debtors' equity shareholders who derived benefit to the extent of the money actually advanced by the lenders. In such a circumstance, the appropriate remedy might well be subordination, which would benefit the creditors harmed by the improper LBO diversion of the debtors' assets while leaving the lenders with a claim superior to the shareholders for the fair value of the loans which they extended to the debtors.[2]

---

[2] It should be emphasized that the language relied upon by the FCC in the *Best Products* and *Crowthers McCall* decisions did not constitute holdings by the respective bankruptcy courts determining remedies in litigated fraudulent conveyance claims. The courts in both cases were merely discussing the hurdles which the debtors might face in the context of approving settlements of

The constructive fraudulent conveyance claim involved in this adversary proceeding bears no resemblance to the putative fraudulent transfer claims which were the subject of *Best Products* and *Crowthers McCall.* The debts owing to the lenders in those cases which might have been subordinated, rather than avoided altogether, in the LBO context were supported dollar-for-dollar by loans actually advanced to and received by the debtors. To avoid those debt obligations would deprive the lenders of consideration actually given and resulted in a windfall for the shareholders who allegedly were the real beneficiaries of the loan proceeds. By contrast, neither NPCI nor its shareholders or creditors received any consideration from the FCC in respect of the $3.7 billion Fraudulently Incurred Obligation, and to enforce that Obligation even as subordinated debt would constitute a windfall for the FCC. Moreover, the settlements of the putative fraudulent transfer claims against the lenders in *Best Products* and *Crowthers McCall* were approved in the context of seeking to approve those debtors' reorganization plans. By contrast, in this case to allow $3.7 billion as a subordinated claim would preclude NPCI's access to public funding and thereby undermine any practical likelihood of NPCI's success as a reorganized debtor.

Finally, Judge (now Chief Judge) Brozman's decision in *Best Products* expressly recognizes the appropriateness of the remedy fashioned in this decision in a case such as this involving avoidance of an obligation for

---

possible fraudulent transfer claims which were not, in fact, litigated.

which the debtor received no consideration. Judge Brozman noted:

> On the other hand, if the underlying fraudulent transfer statute (such as DCL § 273) provides for the avoidance as fraudulent of an obligation incurred, it could be argued fairly persuasively that so much of the obligation which the debtor incurred as was not supported by consideration *to the debtor*, ought be avoidable. (emphasis in original)

Best Products at 59, citing *In re Candor Diamond Corp.*, 76 B.R. 342 (Bankr. S.D.N.Y. 1987).

Nor can the FCC take comfort from the citation and quotation on *In re Vintero Corp.*, 735 F.2d 740, 742 (2d Cir.) ("To the extent that [a debtor's] other creditors . . . are affected adversely by enforcement of [an avoidable] security interest, there is no reason why such interest should not be enforced"), *cert., denied*, 469 U.S. 1087, 105 S. Ct. 592, 83 L.Ed.2d 702 (1984). There can be no question that that the debtor and its shareholders and its creditors would be affected adversely by y any enforcement of the $3.7 billion Fraudulently Incurred Obligation in exchange for which the FCC provided no consideration to the debtor.

Finally, the FCC's arguments based upon *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 106 S. Ct. 755, 88 L.Ed.2d 859 (1986), *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 104 S. Ct. 1188, 79 L.Ed.2d 482 (1984), *In re D.H. Overmyer Telecasting Co.*, 35 B.R. 400 (Bankr. N.D. Ohio 1983) and *In re Nitec Paper Corp.*, 43 B.R. 492 (S.D.N.Y. 1984) to the effect that bankruptcy proceedings cannot be used to override the regulatory

authority of administrative agencies have been fully dealt with in this Court's December 7, 1998 decision on the FCC's motion to dismiss for lack of subject matter jurisdiction and June 16, 1999 decision denying the FCC's motion to lift the automatic stay. Reference is made to those decisions. Suffice it here to say that the issues before this Court in this adversary proceeding concern solely the debtor-creditor relationship between the FCC and NPCI. Nothing in the Federal Communications Act or elsewhere in the law exempts the FCC from the operation of the Bankruptcy Code *in its capacity as a creditor.* Nothing in this Court's May 12 Decision or in this Decision on Remedy implicates the FCC's regulatory jurisdiction.

NPCI is entitled to judgment in accordance with this Decision.

APPENDIX I

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Bankruptcy No. 98 B 21529(ASH)

IN RE NEXTWAVE PERSONAL COMMUNICATIONS, INC., ET AL., DEBTORS

June 16, 1999

DECISION DENYING MOTION TO LIFT THE AUTOMATIC STAY

ADLAI S. HARDIN, JR., Bankruptcy Judge.

Following this Court's decision dated May 12, 1999 (the "May 12 Decision") sustaining the constructive fraudulent conveyance claim of debtor NextWave Personal Communications, Inc. ("NPCI"), the Federal Communications Commission ("FCC") has moved to lift the automatic stay under 11 U.S.C. § 362(d)(1) for "cause." The alleged "cause" is that, by reason of the May 12 Decision, NPCI will not be paying the full amounts of its winning bids in the C block auction for 63 spectrum licenses awarded to it by the FCC.

For the reasons stated below, the motion is denied.[1]

---

[1] The Court has jurisdiction of the debtor's Chapter 11 case and this contested matter by reason of 28 U.S.C. §§ 1334(a) and 157(a) and the standing order of reference dated July 10, 1984 signed by

In addition to the May 12 Decision, of particular relevance to this motion is this Court's Revised Decision on Motion to Dismiss dated December 7, 1998 (the "December 7 Decision"), which granted in part and denied in part the FCC's motion to dismiss for lack of subject matter jurisdiction NPCI's adversary proceeding against the FCC. To avoid unnecessary repetition in this decision, familiarity with the December 7 Decision and the May 12 Decision is assumed.

NPCI's winning bids for the 63 spectrum licenses in the C block auction and reauction ending May and July 1996 totaled $4.7 billion, an average of $1.53 per MHz/Pop. The C block licenses were not awarded to NPCI until January 1997. The FCC's auction of D, E and F block licenses commenced in September 1996 and concluded in mid-January 1997. The average price bid per MHz/Pop for D, E and F block licenses was $0.33. The prices bid in the D/E/F block auction and other factors[2] undermined the public perception of the value of the C block licenses and made it impossible for the winning C block licensees to raise any money in the public market necessary to build out their wireless systems as required under the FCC license regulations. *See* 47 C.F.R. § 24.203.

NPCI filed its Chapter 11 petition on June 8, 1998 and, the same day, filed its adversary proceeding against the FCC seeking, *inter alia*, to declare voidable its $4.7 billion bid obligation as a constructive fraudulent conveyance under 11 U.S.C. § 544. In the May 12 Decision this Court sustained the constructive fraudu-

---

Acting Chief Judge Robert J. Ward. This is a core proceeding under 11 U.S.C. § 157(b)(2).

[2] *See* May 12 Decision at footnote 11.

lent conveyance claim based upon findings that the total value received by NPCI in exchange for its payment obligation to the FCC was $1.023 billion. As a consequence of the May 12 Decision and the Court's Decision on Remedy, the NPCI's payment obligation to the FCC will be reduced from $4.7 billion to $1.023 billion.

The FCC's motion to lift the automatic stay is based upon (i) the fact that NPCI will not be paying the full $4.7 billion that it bid for its 63 C block licenses and (ii) the FCC's own regulations.

The FCC's regulations conditioned the grant of C block licenses upon the licensee's "full and timely payment of the winning bid." 47 C.F.R. § 24.708(a); *see also* 47 C.F.R. § 1.2109(a) (1996) (same). In circumstances where the regulations permit certain designated entities such as NPCI to pay the full amount of their high bids in installments over the term of their licenses, 47 C.F.R. § 1.2110(e) (1996), a license "granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan." 47 C.F.R. § 1.2110(e)(4) (1996). In the event of default by the licensee, "the license will automatically cancel and the Commission will initiate debt collection procedures." 47 C.F.R. § 1.2110(e)(4)(iii) (1996).

Asserting that the requirement that a licensee pay its winning bids in full "is the keystone of the FCC's spectrum auction program" (FCC Memo at 2),[3] the FCC

---

[3] This assertion may be viewed with some skepticism in view of the FCC's oft-repeated acknowledgement that revenue generation

argues in substance that the provision in the regulations for automatic cancellation of NPCI's licenses upon default in NPCI's payment obligation constitutes "cause" under Section 362(b)(1) of the Bankruptcy Code for relief from the automatic stay to permit the FCC, in effect, to reclaim the "cancelled" licenses and otherwise pursue its remedy under its regulations.

The issue thus raised is closely related to the issues raised in the FCC's initial motion to dismiss for lack of subject matter jurisdiction. For this reason. the analysis in the December 7 Decision largely disposes of the FCC's contentions on this motion. To summarize that Decision, Section 309(j) of the Federal Communications Act ("FCA") provides the statutory authority for the FCC's spectrum auction program, including the authorization to grant special financing incentives to designated entities through deferred payment in installments. In so doing, Congress authorized the FCC not only to act in its capacity as a regulator of spectrum licenses, but also to become a creditor of licensees qualifying as designated entities. However, nothing in Section 309(j) or elsewhere in the FCA granted the FCC, acting in its capacity as a creditor, any rights, privileges or obligations superior to or different from the rights, privileges and obligations of other creditors. More specifically, nothing in the FCA or elsewhere granted the FCC acting as a creditor any exemption from the provisions of the Bankruptcy Code, and Congress has declined to grant any such exemption despite the FCC's attempts to lobby for such an exemption.

---

for the Federal government is *not* the primary objective of Section 309(j) of the FCA and the FCC's auction regulations.

With this perspective, the FCC's contentions on this motion may be easily resolved. Like any other creditor, the FCC is subject to the avoidance powers provided in Sections 544 and 548 of the Bankruptcy Code. As would be the case with any other creditor in similar circumstances, for the reasons set forth in the May 12 Decision NPCI's aggregate bid obligation to the FCC of $4.7 billion was subject to avoidance to the extent of $3.7 billion. As a consequence, NPCI's "payment obligations" to the FCC *have been reduced* from $4.7 billion to $1.023 billion, of which some $473 million has already been paid. The balance will have to be paid by NPCI under the installment plan authorized by Congress and implemented by the FCC regulations. Of course, if NPCI were to default in the future in its payment obligation on the balance, its spectrum licenses would then be subject to automatic cancellation under 47 C.F.R. § 1.2110(e)(4)(iii). But for the present NPCI is not in default. Unless and until NPCI defaults in "the full and timely performance of [its] licensee's payment obligations under the installment plan," there is no default and, therefore, no "cause" to lift the automatic stay under 11 U.S.C. § 362(d)(1).

The FCC argues that its regulations condition grant of the licenses upon "full and timely payment of the *winning bid amount*" (emphasis supplied), citing to the language in Section 24.708(a) of 47 C.F.R. NPCI retorts that the automatic cancellation provision in Section 1.2110(e)(4)(iii) refers to default in the "fall and timely performance of the licensee's *payment obligations*" (emphasis supplied). But the difference in wording between "winning bid amount" and "payment obligations" is immaterial. Whatever the verbiage, the substance of the matter is that the FCC's right to

payment as a creditor is subject to avoidance under the relevant Bankruptcy Code provisions just like the right to payment of any other creditor.

Nor is it material that the FCC has provided in its regulation that the grant of the licenses is conditioned upon full payment of either the licensee's "winning bid amount" or "payment obligations," or that the regulations provide for automatic cancellation of the licenses upon default. Aside from the fact that there has been no default by NPCI, the FCC's own regulations are entitled to no more nor less weight in the context of bankruptcy proceedings than the contractual notes, mortgages and similar documents required by other creditors in commercial transactions. Creditors' rights under their contracting documents are frequently subject to modification under provisions of the Bankruptcy Code such as the avoidance powers in Sections 544 and 548. Stated simply, the FCC's regulations, to the extent that they establish and govern the rights and obligations of the FCC and the licensee *in their capacities as creditor and debtor*, are subject to modification under the Bankruptcy Code, just like the contractual rights and obligations of an ordinary creditor vis a vis its debtor. As stated in the December 7 Decision:

> The basic defect in the FCC's argument is that Congress did not confer upon the FCC the power to determine unilaterally its own rights as a creditor in competition with and to the detriment of other creditors. . . . Nothing in Section 3090 or elsewhere in the FCA even suggests that Congress intended to empower the FCC to promulgate orders [or regulations] which have nothing to do with its regulatory functions and which are designed solely

> to enhance the FCC's position as a creditor to the detriment of rights provided under the Bankruptcy Code for the benefit of other creditors and the debtor.

The cases relied upon by the FCC do not support its position. For the contention that "[t]hese regulatory conditions upon the Licenses remain fully enforceable by the FCC even though NextWave is in bankruptcy" (FCC Memo at 2) the FCC cites *In re Farmers Markets, Inc.*, 792 F.2d 1400, 1403 (9th Cir. 1986), where the Ninth Circuit said "the estate takes the license subject to the restrictions imposed on the debtor by its transferor." To the same effect the FCC cites *In re Bay Ridge Inn*, 94 F.2d 555 (2d Cir. 1938). As pointed out in NPCI's opposing memorandum, both *Farmers Markets* and *Bay Ridge* concern sale or transfer of liquor licenses from one party to another, with direct implication of the governmental regulatory power. Similarly, the case of *In re Gull Air, Inc.*, 890 F.2d 1255 (1st Cir. 1989) concerns the FAA's power under regulations respecting the use of airport slots not being used by the debtor airline and having nothing to do with any debtor-creditor relationship. By contrast, the regulations relied upon by the FCC in this case are concerned solely with the debtor-creditor relationship between the parties and do not implicate the FCC's regulatory jurisdiction.

To summarize, the FCC is subject to the provisions of the Bankruptcy Code in its capacity as a creditor. NPCI's payment obligations to the FCC in respect of its winning bids on C block licenses have been modified in accordance with the avoidance provisions of Section 544 of the Bankruptcy Code. The modification of the

FCC's rights as a creditor in accordance with the Bankruptcy Code does not constitute a default by NPCI, and NPCI is not in default in respect of its modified payment obligations. Accordingly, there is no "cause" to lift the automatic stay under Section 362(d)(1), and the FCC's motion must be denied.

APPENDIX J

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
WHITE PLAINS DIVISION

Bankruptcy No. 98 B 21529(ASH)
Adversary No. 98-5178A

IN RE NEXTWAVE PERSONAL COMMUNICATIONS, INC., ET AL., DEBTORS

NEXTWAVE PERSONAL COMMUNICATIONS, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

May 12, 1999

DECISION ON CONSTRUCTIVE FRAUDULENT CONVEYANCE CLAIM

ADLAI S. HARDIN, JR., Bankruptcy Judge.

In January 1997 defendant Federal Communications Commission ("FCC") awarded to plaintiff-debtor NextWave Personal Communications, Inc. ("Debtor" or "NPCI") 63 C block licenses for radio spectrum for personal communications service ("PCS") based on NPCI's winning bids aggregating $4.7 billion in the C block auction and reauction ending in May and July

1996. Concluding subsequently that the value of its C block licenses had been less than $1 billion in February 1997 when it executed notes to the FCC for 90% of its bid obligation, NPCI commenced this adversary proceeding in June 1998 seeking, *inter alia*, a determination that its deposits and promissory notes aggregating $4.7 billion (the "Transfers") constituted constructively fraudulently conveyances subject to avoidance under 11 U.S.C. § 544.

On the facts and the law, I conclude that the Transfers are subject to avoidance under Section 544 in the measure calculated at the foot of this decision.

Jurisdiction

This Court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 1334(a) and 157(a) and the "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York, dated July 10, 1984 (Ward, Acting C.J.). This is a core proceeding under 28 U.S.C. § 157(b)(2)(H).

Procedural Background

On June 8, 1998 NPCI and certain of its affiliates filed petitions under Chapter 11 of the Bankruptcy Code, and on the same date NPCI filed this adversary proceeding. On July 13, 1998 the FCC moved simultaneously to withdraw the reference and to dismiss the adversary proceeding for lack of subject matter jurisdiction. The District Court denied the motion to withdraw the reference on November 9, 1998. This Court scheduled a hearing on the motion to dismiss and on December 7, 1998 issued a decision denying the motion

with respect to the constructive fraudulent conveyance claim and granting the motion to the extent of dismissing the debtor's other claim against the FCC.

On January 26, 1999 the FCC made a motion for partial summary judgment with the object of determining whether the C block licenses should be valued as of the May and July 1996 dates of conclusion of the auction and reauction, or in January/February 1997 when the FCC awarded the C block licenses to NPCI and NPCI issued its promissory notes for $4.2 billion. On February 16, 1999 the Court issued its decision determining that the C block licenses should be valued as of January/February 1997 when the licenses were awarded and the debtor completed the Transfers.

On March 24, 1999 the FCC filed a motion for judgment on the pleadings asserting, in substance, that the controlling Federal law does not recognize constructive fraud liability in connection with financial transactions that are open to public scrutiny. On April 2, 1999 the Court denied the FCC's motion in an oral ruling and held a final pretrial conference.

The case was tried in seven lengthy trial days commencing April 19 and concluding April 27. The adversary process and the Court benefitted by exceptionally able counsel and witnesses on both sides.

Findings and Conclusions

The following are the Court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52 made applicable in this proceeding by Bankruptcy Rule 7052.

Facts

Allocation and Auction of Radio Spectrum

Wireless telecommunications (telephony) involve the transmission of voice and data between points using radio frequency spectrum as the transport medium. The first cellular telephone systems, developed by Bell Laboratories in the 1960s, derived their name from the small geographic areas, called "cells," into which the service region was subdivided. Each cell was supported by a single transmitter/receiver called a base station, which was connected to the public switched telephone network via a mobile services switching center using traditional lines or microwave link. Cellular systems utilized analog technology, although cellular operators are switching to digital.

In 1981 the Federal government, through the FCC, began the process of establishing commercial wireless networks in the United States by designating two cellular licensees within each metropolitan statistical area ("MSA"). These licenses were for frequency located in assigned portions or bandwidths designated in megaherz ("MHz") of the radio spectrum. By 1989 cellular service was operational in every MSA, and the same year the FCC auctioned additional licenses for each rural statistical area ("RSA"). In the early 1990s the government decided to end the cellular duopoly controlling wireless services in the MSAs and RSAs by establishing new licenses that could be used to compete with the incumbent cellular carriers. Specifically, spectrum bandwidth was set aside for PCS.

Prior to Congress' enactment of Section 309(j) of the Federal Communications Act ("FCA"), the House Committee on Energy and Commerce (the "Committee") recognized that the radio frequency spectrum is a "precious but limited resource [that] has become vitally important to our economic success and social well being." *See* H.R. Rep. No. 103-11 at 247-48 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 574-75. Noting that the congested state of the radio frequency spectrum limited the ability to accommodate new spectrum-dependent technologies and that existing procedures for issuing radio spectrum licenses by lottery and comparative hearings had resulted in regulatory inefficiencies and permitted licensees to exploit a national resource unjustly, the Committee concluded

> that a carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves.

Id. at 580.

In Section 309(j) of the FCA Congress authorized the FCC to issue radio spectrum licenses for PCS to various categories of qualified applicants through a system of competitive bidding. 47 U.S.C. § 309(j)(1), (2). Among the categories of applicants, the FCC was directed by the statute to designate portions or "blocks" of the radio spectrum for auction to small, emerging businesses and to establish flexible, deferred license payment plans at below market interest rates to enable such enterprises to participate and compete in the communications industry. 47 U.S.C. § 309(j)(3)(B) and (4)(D).

Consistent with this Congressional mandate, the FCC divided spectrum to be used for PCS into "blocks" designated as the A/B/C/D/E/F blocks and promulgated detailed regulations for public auction of all six blocks. The regulations were adopted with the advice and counsel of knowledgeable experts in the private sector after public hearings and were well designed to ensure that all participants had access to maximum relevant information and opportunity to bid. There are four principal differences among the six blocks—geographic area covered, amount of spectrum per license, eligibility to participate in the auction and timing of the auction.

The A and B block licenses are allocated geographically to 51 Major Trading Areas ("MTAs") throughout the United States and its territories based on the Rand-McNally Commercial Atlas & Marketing Guide (the "Guide"). The C, D, E and F block licenses are allocated geographically to 493 Basic Trading Areas ("BTAs") throughout the United States and its territories based on the Guide. Thus, every MTA incorporates within its borders a cluster of BTAs. Each MTA and BTA is covered by a single license for each block. Hence, the FCC auctioned 51 licenses in each of the A block and B block auctions and 493 licenses in each of the C, D, E and F block auctions.

Each A and B block license is for thirty MHz of spectrum. The C block licenses also consist of thirty MHz of spectrum. Each D, E and F block license covers ten MHz of spectrum.

The C block and F block auctions were open only to entrepreneurs or small businesses including start-up companies, firms owned by minorities or women, and rural telephone companies, sometimes referred to as

"Designated Entities." Consistent with the mandate of Section 309(j), recognizing that such entrepreneurial and modestly capitalized enterprises would be incapable of competing with large, established and well-financed companies either in the auction process or the marketplace, Designated Entities received material financial benefits as well as the exclusive right to bid in the C and F block auctions. Respecting the C block, "small businesses" received a 25% bidding credit and the right to pay 90% of their high bid obligation to the FCC (net of the credit) over a ten-year license period, with payment of interest only for the first six years and quarterly installment payments of interest and principal in the last four years. With respect to F block, "small businesses" received a 15% bidding credit, and "very small businesses" received a 25% bidding credit, and the right to pay 80% of their high bid obligations to the FCC (net of the credit) over a ten-year period, with payment of interest only for the first two years and quarterly installment payments of interest and principal in the last eight years. The interest rate payable by C and F block licensees was the rate on 10-year U.S. Treasury Notes at the time of the license issuance.

All of the auctions were conducted in a simultaneous, multiple round, license-by-license, open bid format. The A/B block auction was conducted simultaneously between December 5, 1994 and March 13, 1995. All of the A/B block licenses, with the exception of certain licenses granted pursuant to pioneer preference grants, were conditionally granted on June 23, 1995. The FCC did not conduct any other broad band PCS spectrum auction prior to the A/B block auctions. There were thirty qualified bidders in the A/B block auction. The 102 licenses issued in these auctions (51 A block; 51 B

block) were awarded to bidders who paid an aggregate sum of $7.7 billion for all 102 licenses.

The first C block auction was conducted between December 19, 1995 and May 6, 1996. There were 255 qualified bidders competing for 493 licenses. The regulations prohibited any participant from being declared high bidder of more than 98 (*i.e.*, 20%) of the C block licenses. 47 C.F.R. Ch. I, § 24.710(a).[1] From July 3 to July 16, 1996 the FCC reauctioned certain C block licenses that had become available when the previous high bidders defaulted. Competition in the C block auction, particularly for licenses for BTAs having higher population densities (referred to as "Pops," or population expressed in 000's, as 2,400 Pops for 2,400,000 of population), was intense and drove prices to extraordinarily high levels in comparison to the prior A/B block auction and the subsequent D/E/F block auction. The aggregate net high bids totaled $10.071 billion in the initial C block auction and $904.6 million in the July 1996 reauction.

Although the FCC had issued a release in August 1995 stating that D/E/F block licenses would be auctioned in the last quarter of 1996, it appears that participants in the marketplace did not anticipate that the D/E/F blocks would be auctioned immediately after the C block auction and before the C block licenses had been awarded and necessary financing to "build out" the C block licenses obtained. Nevertheless, in August 1996 the FCC scheduled the D/E/F block auction, which took place from August 26, 1996 through January 14,

[1] The same limitation applied to the F block auction. The regulation prohibited indirect violation of the 20% limitation by the use of affiliates. *Id.* at § 24.710(b).

1997. Like the prior PCS auctions, the D/E/F block auction was conducted simultaneously in open bid, multiple round format. Fourteen hundred seventy-nine licenses were at issue in the D/E/F block auction, 493 for each block. There were 153 qualified bidders. Although the D/E/F block auction did not formally close until January 14, 1997, over 80% of the bidding was completed by October 30, 1996, and it was clear by early November that the prices paid for the D/E/F block licenses would be a fraction of those paid in the C block auction. The aggregate high bids, net of bidding credits, for the 1,493 D, E and F block licenses totaled $2.5 billion.

As a consequence of the three PCS auctions, the largest PCS licensees are Sprint PCS and AT & T Wireless PCS, with combinations of A, B, D and E block licenses covering 99% and 93% of total U.S. Pops. The third largest holder of PCS spectrum is NextWave (through its subsidiaries) with 61% of Pops covered, followed by OmniPoint PCS Entrepreneurs (36%), Western Wireless (23%) and PrimeCo PCS (23%), all holding combinations of 30 MHz and 10 MHz licenses in the C and D/E/F blocks.

In addition to the numerous categories of spectrum other than PCS utilized for wireless telephony, wireless operators employ a variety of technologies. The original analog systems have been largely replaced by digital standards, principally time division multiple access ("TDMA"), global system for mobile communications ("GSM"), frequency division multiple access ("FDMA") and code division multiple access ("CDMA"). Third generation wireless technology (3G) is the next wireless technology for future applications. AirTouch,

Sprint, PCS, Bell Atlantic and PrimeCo (PCS) have all deployed CDMA, forming a nationwide footprint among the cellular and PCS operators. NextWave utilizes CDMA technology.

Although the market for wireless communication has expanded enormously in the 1990s, so has competition and the number of wireless operators, resulting in a dramatic reduction in average revenue per user ("ARPU"). Monthly ARPU declined from $96.83 at year-end 1987 to $47.70 by the end of 1996.

The three separate auctions conducted for the A/B blocks, the C block and the D/E/F blocks produced radically different financial consequences. The six auctions involved different quanta of geography and population (MTAs for the A and B blocks; BTAs for the C, D, E and F blocks) and spectrum (30 MHz for the A, B and C blocks; 10 MHz for the D, E and F blocks). Nevertheless, prices for PCS licenses may be compared, *inter alia*, by stating the prices in terms of Price per Pop or Price per MHz-Pop. The A/B block licenses were auctioned for an average price of $0.52 per MHz-Pop (all prices here expressed net of bidding credits). For C block, the average price for the main auction ending May 6, 1996 was $1.33 per MHz-Pop, and for the July reauction the average price was $1.94 per MHz-Pop. The D/E/F block licenses were auctioned for an average price of $0.33 per MHz-Pop. NPCI bid an average of $1.53 per MHz-Pop for its 63 C block licenses.

Cellular and PCS operators are not the only ones utilizing radio spectrum for wireless telephone communications. One such system is enhanced specialized mobile radio ("ESMR"). The primary operator utilizing ESMR to construct a nationwide wireless network is

Nextel Communications ("Nextel"). The FCC auctioned ESMR licenses in the 800 MHz frequencies in 1997. The FCC also auctioned licenses for wireless communications services ("WCS") in 1997, and thereafter the FCC auctioned spectrum for local multipoint distribution service ("LMDS"), which can be used for a variety of services, including wireless telephony and data.

Before turning to the particular facts in this case, it is important to highlight a distinguishing feature of the spectrum auctions. In the traditional auction the declaration of the winning bidder fixes the winner's right to and obligation to pay for the thing auctioned. There is little gap in time between the "fall of the hammer" and the exchange of payment for title to the thing auctioned. Not so in a spectrum auction. The FCC's acceptance of a high bid for a license in a particular BTA did not entitle the winner to the license, but only to the exclusive right to file a long form application seeking FCC approval for the license. Such approval was by no means assured and was subject to challenge by competing bidders or others. The approval process might take months to complete, and did in the case of the C block auction.

During the gap period between the conclusion of the C block auction and reauction in May and July 1996 and the approval of NPCI's application in January 1997 there was a profound change in the value of spectrum as perceived by participants in the PCS market and the financial community on which the participants were dependent. This change in perception of value is the genesis of this controversy.

NextWave Participation in the C/D/E/F Block Auction

NPCI is a wholly-owned subsidiary of NextWave Telecom Inc. ("NTI"), a corporation organized and existing under the laws of the State of Delaware with its principal place of business in San Diego, California, and a place of business in Hawthorne, New York. Among NTI's direct and indirect subsidiaries which filed a Chapter 11 petition on June 8, 1998 was NextWave Power Partners Inc. ("NPPI"). NTI filed for relief under Chapter 11 on December 23, 1998. NTI and its affiliates which have filed in this Court are collectively referred to as "NextWave". NextWave was organized in May 1995 to take advantage of the opportunities in the relatively young but burgeoning wireless telephony industry provided by Section 309(j) of the FCA for small businesses qualified to participate in the C and F block auctions.

C Block Auction

At the conclusion of the C block auction on May 6, 1996 the FCC announced that it had received high bids for the 493 C block licenses and designated approximately 90 high bidders. NPCI was declared the high bidder on 56 licenses. On July 3, 1996 the FCC commenced the 1996 reauction for eighteen C block licenses that became available when previously-declared high bidders failed to tender their required earnest money deposits. At the close of the reauction on July 12, NPCI was high bidder on seven additional licenses, bringing its total C block licenses to 63.

The FCC regulations required prospective bidders to deposit funds with the FCC in advance of the auctions to establish their eligibility to bid ("upfront payments"). The regulations further required winning bidders to make an additional deposit with the FCC to bring their total earnest money deposit to 5% of their total bid obligation. NPCI complied with these requirements, and as of July 23, 1996 NPCI had deposited with the FCC upfront payments and post-auction and reauction deposits aggregating $237,182,402 (the "Pre-License Payments"), representing 5% of NPCI's total bids of $4,743,648,000. NPCI duly filed long-form applications for all 63 C block licenses for which it was declared high bidder. Objections to NPCI's applications were filed by several different entities. The objections were overcome, and on January 3, 1997 the FCC announced that NPCI would receive its 63 C block licenses, conditioned on compliance with its financial obligations to the FCC.

As required, on January 9, 1997 NPCI made an additional deposit with the FCC bringing its total cash deposits to $474,364,806, or 10% of the total bid price.

On February 14, 1997 the FCC granted NPCI's licenses conditioned upon NPCI executing a series of promissory notes dated as January 3, 1997 payable to the FCC in a total face amount of $4,269,283,223 (the "Notes"). On February 19, 1997 NPCI signed the Notes and accompanying security agreements and delivered them to the FCC.

D/E/F Block Auction

NPCI's affiliate NPPI was the high bidder on 32 10 MHz licenses in the D/E/F block auction which concluded in mid-January 1997. On April 28 and June 27,

1997 the FCC announced the conditional grants to NPPI of 25 D/E/F block licenses and seven D/E/F block licenses, respectively.

NextWave's Efforts to Obtain Public Financing

Like other Designated Entities eligible for the C and F block auctions, NextWave's fledgling capitalization and lack of operating income made resort to the public capital markets essential to fund the high capital cost to build out its PCS system so as to make use of its spectrum licenses. As stated in its Registration Statement filed with the Securities and Exchange Commission (the "SEC") on February 3, 1997 (p. F-7):

> The Company is a development stage enterprise which has incurred net losses since its inception. In order to implement its business plan, significant capital will be required to (i) meet the Company's obligations to the FCC, (ii) build out the PCS network infrastructure necessary to provide service and (iii) cover its operational expenses.

NextWave anticipated that it would require approximately $700 million in public financing to implement its business plan. Half of this amount was proposed to be raised by an initial public offering of equity securities and half by a high yield debt offering. Merrill Lynch was initially retained as lead investment banker for the equity and debt offerings. Additional underwriters for the equity offering included Lehman Brothers, Bear Stearns, Prudential Securities and ING Barings. Additional underwriters for the high yield debt offering included CIB Wood Gundy, Bear Stearns, Lehman Brothers, Prudential Securities and ING Barings. In October 1996 Smith Barney became the lead investment banker for the equity offering and CIB Wood Gundy became the lead investment banker for the debt offering, the other underwriters remaining the same.

The evidence at the trial demonstrated conclusively that, despite the best efforts of NextWave and its investment bankers, it was impossible to obtain the public financing required to build out NextWave's PCS infrastructure and implement its business plan. Although NextWave did obtain loans aggregating some $70 million from two prospective equipment suppliers pursuant to preexisting contractual arrangements, no equity or debt financing could be obtained in the public market.

NextWave was not the only C block licensee to find the public capital markets closed. Approximately $1.6 billion of public financing was sought by C block licensees after the award of their licenses. Not one dollar of this $1.6 billion was raised in the public market. To this date, nearly three years after the 1996 auction and reauction, less than 10% of the C block licenses awarded by the FCC have been placed in service.

FCC Hearings on Restructuring for C Block License Obligations[2]

The marketplace reaction to the C block debt to the FCC did not go unnoticed by the FCC. In early 1997 the FCC received several requests from C block licen-

---

[2] Source: FCC Memorandum in support of its initial motion to dismiss at pp. 4-7. The Court takes judicial notice of those documents in the public record annexed to the FCC's motion to dismiss upon which the factual recitation in the FCC's Memorandum was based.

sees for relief from their installment payments that described a range of difficulties in accessing the capital markets. The FCC Wireless Telecommunications Bureau also received several proposals from C block licensees regarding alternative financing arrangements, as well as a petition for rulemaking regarding C block installment payments. In response to these requests, effective March 31, 1997 the FCC suspended the C block installment payments indefinitely and initiated an elaborate administrative process for restructuring C block license obligations.

On June 2, 1997 the FCC issued a public notice seeking comment on these restructuring proposals and inviting additional ones. The FCC received over 160 filings in response.

On June 30, 1997 the FCC conducted a public forum in Washington, D.C. to discuss issues regarding C block installment payments. Both before and after the public forum the FCC received numerous comments, reply comments and *ex parte* letters and presentations which provided the Agency with a wide range of restructuring proposals from C block licensees, financial institutions, investors, equipment vendors and other interested parties. The FCC established a task force to evaluate all these proposals and to recommend an appropriate course of action.

On October 16, 1997, after more than six months of effort, the FCC rendered its initial decision regarding financial relief for C block licensees and issued a Restructuring Order which provided distressed C block licensees with four distinct, mutually-exclusive options. In response to the Restructuring Order, the FCC received 37 petitions for reconsideration, seventeen

oppositions to these petitions, sixteen replies and 38 *ex parte* filings. Several petitioners claimed that the options set forth in the Restructuring Order did "not provide commercially viable alternatives for financially troubled licensees" and "fell short of meaningful relief."

The FCC issued its Reconsideration Order on March 24, 1998. Upon review of the administrative record, the FCC decided that "a radical departure from the [Restructuring Order was] not warranted." Accordingly, the FCC left intact the "basic framework" of the Restructuring Order, modifying it only slightly in the Reconsideration Order "to allow licensees to be more flexible in making their elections for licenses in different geographic areas, to use more of the downpayments already on deposit, and to be more flexible in the use of those downpayments."

The 1999 Reauction of C, E and F Block Licenses

In the spring of 1999 the FCC conducted a reauction of 347 licenses from the C, E and F blocks, including 206 30 MHz C block licenses, 133 15 MHz C block licenses (the 15 MHz C block licenses presumably resulted from a licensee electing the disaggregation alternative under the FCC's Restructuring Orders), 6 10 MHz E block licenses and two 10 MHz F block licenses. The auction began on March 23 and concluded after 78 rounds of bidding on April 15, 1999. There were 76 qualified bidders.

Three hundred two licenses were bid in by 57 bidders, leaving 45 licenses unsold. The aggregate of net bids for all 302 licenses was $342,840,945, equating to a little less than $0.20 per MHz-Pop.

Discussion

I. *Constructive Fraudulent Conveyance Law*

A. *Statutory Framework*

Section 544(b)(1) of the Bankruptcy Code provides:

> . . . the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 544(b).

Section 544 incorporates the Uniform Fraudulent Transfer Act ("UFTA"), as codified by the State of California, which provides, in pertinent part:

> A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:
>
> * * *
>
> (b) without receiving reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (1) was engaged or was about to engage in a business or transaction for which the remaining

> assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (2) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Cal.Civ.Code § 3439.04 (West 1997). The UFTA, which has been adopted by 33 states and is the successor to the Uniform Fraudulent Conveyance Act ("UFCA"), resembles the provisions of 11 U.S.C. § 548 more closely than did the UFCA. 5 *Collier on Bankruptcy* ¶ 548.01[3], p. 548-8 (15th ed. 1979).

Section 548 of the Bankruptcy Code provides:

> (a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii) (I) was insolvent on the date that such transfer was made or such obligation was

incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay such debts as such debts matured.

11 U.S.C. § 548(a).

In considering the appropriate choice of law, the fraudulent transfer provisions of California, New York[3] or the District of Columbia[4] may be applicable. The Court accepts NPCI's unopposed position that the fraudulent conveyance statutes in each of these states

---

[3] New York's Debtor and Creditor Law § 273 provides:

Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

[4] District of Columbia Code (1981) § 28-3105 provides:

(a) A transfer made, or obligation incurred, by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

are, in all material respects, the same with a minor exception in the case of New York. To explain, both California and the District of Columbia have incorporated the UFTA. New York continues to apply the UFCA, which requires the exchange of "fair consideration" rather than "reasonably equivalent value." N.Y. Debt. & Cred. Law § 273 (McKinney 1990). Fair consideration is defined in § 272 of the New York Debtor and Creditor Law to incorporate the concept of "good faith." *See In re Checkmate Stereo & Electronics, Ltd.*, 9 B.R. 585, 591 (Bankr. E.D.N.Y. 1981). Courts within this district have repeatedly held that the elements needed to prevail on a fraudulent conveyance action are essentially the same under New York's Fraudulent Conveyance Act and 11 U.S.C. § 548. *See, e.g., In re Ames Dept. Stores, Inc.*, 161 B.R. 87, 89 n.1 (Bankr. S.D.N.Y. 1993); *In re Curtina Int'l, Inc.*, 23 B.R. 969, 973-74 (Bankr. S.D.N.Y. 1982). The California, New York and District of Columbia fraudulent conveyance statutes are also in all material respects the same as the fraudulent conveyance provisions provided in 11 U.S.C. § 548. Because Section 548 of the Bankruptcy Code and the UFTA "are of common ancestry," both courts and commentators have concluded that "[c]ases under one are . . . authoritative under the other." *Interpool Ltd. v. Patterson*, 890 F. Supp. 259, 268 n.8 (S.D.N.Y. 1995); *see also, In re United Energy Corp.*, 944 F.2d 589, 593-94 (9th Cir. 1991); 5 Lawrence P. King, *Collier on Bankruptcy*, ¶ 548.01[4] (1999) ("Cases decided under the UFCA and UFTA are considered to be persuasive authority for similar issues arising under section 548 of the Code"). Accordingly, as the parties appear to concede, a choice of law analysis is unnecessary in the instant case since the fundamental legal principles would not change under any possible choice of law.

B. *General Purpose*

Section 544 promotes the central bankruptcy policy of equitable distribution amongst all creditors. *See In re Giordano*, 188 B.R. 84, 88 (D. R.I. 1995); *In re 375 Park Avenue Assocs., Inc.*, 182 B.R. 690, 695 (Bankr. S.D.N.Y. 1995); *In re AP Industries*, 117 B.R. 789, 800 (Bankr. S.D.N.Y. 1990) (citing *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1042 (2d Cir. 1986), *cert. denied*, 479 U.S. 950, 107 S. Ct. 436, 93 L.Ed.2d 385 (1986)). Further, Section 544 advances the goal that a debtor's prepetition transfers should not deprive creditors of property from which their claims can be satisfied. *In re Stoecker*, 131 B.R. 979, 984 (Bankr. N.D. Ill. 1991) (citing H. Rep. No. 595, 95th Cong., 1st Sess. 375 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 89-90 (1978), *reprinted* in 1978 U.S.C.C.A.N. 5787).

C. *Elements of Recovery*

As set forth above, in order to prevail on its Section 544 claim, NPCI must demonstrate that it: (1) incurred an obligation (2) at a time when it was engaged or was about to engage in a business or transaction for which the remaining assets of NPCI were unreasonably small in relation to the business or transaction, or intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due (3) for which it did not receive reasonably equivalent value.

(1) *Incurrence of Obligation*

Generally an obligation is incurred when a debtor becomes legally obligated to pay. *In re Emerald Oil Co.*, 695 F.2d 833, 837 (5th Cir.1983); *Barash v. Public*

Finance Corp., 658 F.2d 504, 511 (7th Cir. 1981); *see also In re G. Survivor Corp.*, 217 B.R. 433, 440 (Bankr. S.D.N.Y. 1998). While the Bankruptcy Code is silent on the question of when a debt or obligation is "incurred," courts have not questioned that an "obligation" to pay principal indebtedness under a promissory note is "incurred" on the date the note is executed and delivered. *E.g., In re Iowa Premium Service.*, 695 F.2d 1109, 1111-12 (8th Cir. 1982); *In re Smith-Douglass, Inc.*, 842 F.2d 729, 730 (4th Cir. 1988); *In re Pippin*, 46 B.R. 281, 283-84 (Bankr. W.D. La. 1984) (holding that, for preference purposes, debtor becomes legally obligated to pay under installment payment contract when contract is executed). The California UFTA provides that "[a]n obligation is incurred . . . if evidenced by a writing, when the writing executed by the obligor is delivered to, or for the benefit of, the obligee." Cal. Civ. Code § 3439.06(e)(2). A statutory provision that is clear and unequivocal on its face should be given full force and effect. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41, 242, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989).

Subject to section II.A., below, the issue has been addressed in the FCC's motion for partial summary judgment. In resolving that motion this Court held that the transfer of licenses for dollars and Notes occurred in the time frame January 3 to February 19, 1997. There is no dispute that the Notes were signed and delivered February 19, 1997, although dated as of January 3, 1997.

(2) *Insolvency*

Insolvency is a question of fact. *In re Roblin Indus., Inc.*, 78 F.3d 30, 35 (2d Cir. 1996). Under Section

3439.04 of the California Civil Code, NPCI needs only to prove that its remaining assets were unreasonably small in relation to the $4.7 billion transaction in which it was about to engage or that upon incurrence of the obligation, the debtor's debts were beyond its reasonable ability to repay. *See, e.g., Patterson v. Missler*, 238 Cal. App. 2d 759, 48 Cal. Rptr. 215, 217 (1965). A transfer may be avoided where the debtor does not receive reasonably equivalent value in exchange for a transfer and the debtor was either "insolvent at the time of the transfer or was engaged in business with unreasonably small capital." *See United Energy*, 944 F.2d at 594. As the term "unreasonably" is relative, it requires judicial consideration of the overall state of affairs surrounding the corporation and the transfer in question. *In re Suburban Motor Freight*, 124 B.R. 984, 999 (Bankr. S.D. Ohio); *Barrett v. Continental Illinois Nat. Bank & Trust*, 882 F.2d 1, 4 (1st Cir. 1989), *cert. denied*, 494 U.S. 1028, 110 S. Ct. 1476, 108 L.Ed.2d 613 (1990). To determine the existence of "unreasonably small assets," courts on a case-by-case basis have used a "balance sheet approach" weighing the raw financial data of the balance sheet of the debtor against the nature of the entity and its need for capital over time. *Barrett*, 882 F.2d at 4. Another approach to the "unreasonably small assets" test is a focus on the debtor's future ability to generate cash and pay its debts as they come due. *See Moody v. Security Pacific Business Credit, Inc.*, 971 F.2d 1056, 1073 (3d Cir. 1992); *see also In re Vadnais Lumber Supply, Inc.*, 100 B.R. 127, 137 (Bankr. D. Mass. 1989).

This element of a Section 544 cause of action has been resolved by the parties by stipulation. In Section V of the Joint Pretrial Order, it has been stipulated that

NPCI has and had creditors holding unsecured claims allowable under Section 502 of the Bankruptcy Code which claims arose both before and after NPCI's obligation to the FCC was incurred; that when NPCI's obligation to the FCC was incurred, NPCI was engaged or was about to engage in a business or transaction for which its remaining assets were unreasonably small in relation to the business or transaction; and that both NPCI and NextWave (as defined above) were insolvent on January 3 and February 14 and 19, 1997, and that NPCI was insolvent on June 8, 1998.

(3) *Exchange of Reasonably Equivalent Value*

The parties agree that the primary analysis of the fraudulent conveyance claim focuses upon the value of the consideration exchanged between the parties at the time of the conveyance or incurrence of debt which is challenged. *See In re Best Products Co.*, 168 B.R. 35, 54 (Bankr. S.D.N.Y. 1994); *see also In re Fairchild Aircraft Corp.*, 6 F.3d 1119, 1126 & n.8 (5th Cir. 1993); *In re Morris Communications NC, Inc.*, 914 F.2d 458, 466 (4th Cir. 1990). Essentially, the Court must determine whether NPCI received reasonably equivalent value by exchanging $474 million in cash and $4.27 billion in promissory notes for 63 C block licenses. *See Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 993 (2d Cir. 1981); *In re Curtina Int'l, Inc.*, 23 B.R. at 974; *Whitehouse v. Six Corporation*, 40 Cal. App. 4th 527, 48 Cal. Rptr. 2d 600, 604 (1995). In other words, the analysis should be directed at what NPCI surrendered and what NPCI received. *In re United Energy Corp.*, 944 F.2d at 594-95.

Reasonable equivalency is a "measurement test," wherein "all aspects of the transaction must be exam-

ined to calculate the value of all the benefits and burdens to the debtor, direct or indirect." *In re Suburban Motor Freight*, 124 B.R. at 997; *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979 (2d Cir. 1981); *In re Vadnais Lumber Supply, Inc.*, 100 B.R. at 136. "There is no precise formula to ascertain what constitutes reasonably equivalent value; the court as the trier of facts must determine this issue under all of the facts and circumstances of the case." *In re Curtina Int'l, Inc.*, 23 B.R. at 974; *see also Interpool Ltd. v. Patterson*, 890 F. Supp. at 268 ("the Court must consider the facts and circumstances of each case in order to determine whether reasonably equivalent value was given"); *In re Joing v. O & P Partnership*, 82 B.R. 495, 499 (D. Minn. 1988); *In re Henry-Luqueer Props., Inc.*, 145 B.R. 771, 775 (Bankr. E.D.N.Y. 1992).

It has been said that "the debtor need not collect a dollar-for-dollar equivalent to receive reasonably equivalent value." *In re Fairchild Aircraft Corp.*, 6 F.3d at 1125-26. Instead, "[t]he touchstone is whether the transaction conferred realizable commercial value on the debtor reasonably equivalent to the realizable commercial value of the assets transferred." *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 647 (3d Cir. 1991), *cert. denied*, 503 U.S. 937, 112 S. Ct. 1476, 117 L.Ed.2d 620 (1992).

The three basic approaches to valuation are: (1) replacement cost approach, (2) the market comparison approach and (3) the income stream analysis. *See In re Executive House Associates*, 99 B.R. 266, 278 (Bankr. E.D. Pa. 1989).

Valuation was the issue tried in this case. The Court's analysis, findings and conclusion are set forth in section III, below.

II. *Preliminary Issues*

A. *Transfer Date of Pre-License Payments*

The FCC argues as a matter of law that the Pre-License Payments totaling $237,182,402[5] equating to 5% of NPCI's C block bids, which had been fully paid to the FCC by July 23, 1996, must be deemed a completed and irrevocable transfer as of that date for fraudulent conveyance purposes. The FCC asserts that "NextWave cannot seriously dispute that it received something of reasonably equivalent value in exchange for" the Pre-License Payments, which constituted a "5% opportunity cost for obtaining the 63 C block licenses for which NextWave had bid $4.74 billion."[6]

In this Court's view, the issue thus raised turns on whether the Pre-License Payments were final and irrevocable by July 23, 1996. If the Pre-License

---

[5] It will be recalled that the $237,182,402 was comprised of two pre-auction upfront payments totaling approximately $86 million and two post-auction cash payments totaling approximately $151,000.

[6] In its decision on the FCC's motion for partial summary judgment, this Court held that the "transfers" as there defined (*i.e.*, the 5% deposit paid in by July 23, 1996, the additional 5% deposit paid in January 1997 and the Notes) constituted transfers made or obligations incurred in the January/February 1997 time frame and were to be valued as of those dates. The FCC did not argue in the motion for partial summary judgment that the Pre-License Payments alone should be deemed completed transfers as of July 1996, and the Court did not decide the issue now presented.

Payments were not subject to repayment to NPCI irrespective of the grant or denial of the licenses in early 1997, one would have to conclude that this 5% deposit was indeed a completed transfer for fraudulent conveyance purposes. As such, it would be in the nature of an "opportunity cost" or a "ticket of admission" to the FCC approval process and its value should be judged as of the date of payment.

On the other hand, if NPCI were entitled to recover the Pre-License Payments in whole or in part depending on the award or denial of the licenses, then to that extent the transfer could not be said to take place for fraudulent conveyance purposes until the award or denial of the licenses. The answer is to be found in the FCC regulations.

Before the auction process begins, FCC regulations require upfront payments as a condition to eligibility for bidding. 47 C.F.R. §§ 1.2106(a) and (c), 24.706(a) (All auction participants are "required to submit upfront payments in accordance with § 1.2106 . . ."), 24.711(a)(1). Any upfront payments must be credited toward any downpayments "required for licenses on which the bidder is the high bidder." 47 C.F.R. § 1.2106(d). If the upfront deposit exceeds "the required deposit of a winning bidder," the balance may be refunded "after determining that no bid withdrawal penalties are owed by that bidder." *Id.*

A clear distinction is made between bidders and the high bidder. Section 1.2106 requires the FCC to credit the upfront payment to the winning bidder's required deposit, subsuming it into the required deposit. The regulation is silent as to upfront payments of unsuccessful bidders, but it is uncontested that the amounts are

refunded to them. Since the upfront payments must be refunded to unsuccessful bidders, they cannot be considered an irrevocable "admission ticket." This is not the case, however, for the post-auction downpayment.

Once the auction closes, the FCC must declare a high bidder. 47 C.F.R. § 1.2107(a). Upon being declared the high bidder for a particular license, the bidder must promptly deposit enough money to bring its total deposit up to the 5% level and submit its "long form" application. 47 C.F.R. §§ 1.2107(b), 24.711(a)(2). The deposit is held:

> . . . until the high bidder has been awarded the license and has paid the remaining balance due on the license or authorization, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case *it will be returned*, less applicable payments.

47 C.F.R. § 1.2107(b), emphasis supplied. This provision makes clear that the 5% deposit, *i.e.* the Pre-License Payments, will be returned "less applicable payments," referring to the penalty provisions in Sections 1.2104(g)(2) and 24.704(a)(2).

These provisions impose penalties in the event of "default or disqualification after close of auction." The minimum possible penalty is 3% of the defaulting bidder's high bid. 47 C.F.R. §§ 1.2104(g)(2) and 24.704(a)(2).[7] One might argue that some ambiguity

---

[7] The penalties under these sections might far exceed 3% of the defaulting bidder's bid, but in no event would the penalty be less than 3%.

exists regarding the applicability of these penalties because the provisions refer only to withdrawal, default or disqualification, while other sections of the regulations refer to "License grant, denial, default and disqualification," 47 C.F.R. §§ 1.2109 and 24.708, suggesting that no penalties might be mandated in the event of a "denial" of license as opposed to "disqualification." However, Section 1.2109 resolves the ambiguity in subsection (c), which states:

> A winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults *or is disqualified for any reason* after having made the required downpayment, *will be deemed to have defaulted* and will be liable for the payment set forth in § 1.2104(g)(2).

Id., emphasis supplied. Thus the FCC's denial of a high bidder's license application, *for any reason*, will trigger at least the 3% penalty.

Taking these regulatory provisions as a whole, once a bidder has been declared high bidder, it must place at least the 3% of its bid at risk irrevocably. Win or lose in the approval process, the regulations provide for no set of circumstances in which this 3% minimum may be returned to the high bidder.

The FCC is therefore correct to the extent that 3% of a bidder's total bid, or three-fifths of its downpayment, was in substance and effect an "admission ticket" to the regulatory process. No guarantee that the bidder would ultimately qualify and receive a grant of license existed, but the regulations comprehend to a certainty that a high bidder will never recover at least the 3%

portion of its 5% downpayment whether by dint of default or disqualification.

Accordingly, $142,309,000 (the "3% Payment"), equating to 3% of NPCI's total C block bids of $4.74 billion or three-fifths of the Pre-License Payments, was irrevocably paid by NPCI to the FCC by July 23, 1996 and would not be repaid to NPCI irrespective of the outcome of the approval process. The consideration received by NPCI in exchange for the irrevocable 3% Payment was the exclusive right to proceed with the approval process by filing a long form application for the 63 C block licenses on which it was high bidder. That consideration constituted reasonably equivalent value for the 3% Payment as a matter of fact and law.

B. *Satisfaction of Antecedent Debt as Reasonably Equivalent Value*

Little need be said of the FCC's argument that the debtor's $474 million of cash downpayments and $4.27 billion of Notes satisfied an "antecedent debt." The argument seems to be, in essence, that when the debtor made its required license payments by delivering the Notes, and thereby did *not* default, it "satisfied" the potential penalty obligation it might have incurred if it had defaulted. Thus, the FCC asks the Court to find that NPCI's $4.7 billion of cash transfers and Notes payable to the FCC was "reasonably equivalent" in value to the penalties for which NPCI might have been liable to the FCC if NPCI had defaulted.

The argument fails because it is based on something that did not happen. The fact is that there was no antecedent debt. No penalty was ever calculated. No penalty was ever applicable. NPCI did not default and

its application was not denied. Analysis of legal rights and obligations under the Bankruptcy Code will be determined upon facts, not hypothetical default obligations never quantified or incurred.

Of course, satisfaction of a genuine antecedent debt may indeed constitute "value" for a prepetition payment or other transfer. *See*, 11 U.S.C. § 548(d)(2)(A); *In re United Energy Corp.*, 944 F.2d 589 (9th Cir. 1991). In this case, however, the "value" received by NPCI for its $4.7 billion was 63 C block licenses, not satisfaction of a fictitious antecedent debt.

III. *Valuation of the C Block Licenses*

A. *Statement of the Issue*

The parties agree on the issue that determines the outcome of the debtor's constructive fraudulent conveyance claim. As stated by NPCI:

> [T]he trial of this Adversary Proceeding requires one straight-forward determination by this Court —what was the value of NPCI's C Block licenses in February 1997? (NPCI Trial Memorandum at 2)

As stated by the FCC:

> The only issue for this Court to resolve at trial is whether the cash transfers made, and payment obligations incurred, by plaintiff-debtor . . . during the C block auction and licensing process were reasonably equivalent in value to the radio spectrum rights that NextWave acquired from [the FCC]. (FCC Trial Memorandum at 1)

The parties agree that:

> Furthermore, the proper analysis focuses solely on the value of the consideration exchanged between the parties "at the time of the conveyance or incurrence of debt which is challenged." [citations omitted] (FCC Trial Memorandum at 4; NPCI's Response at 2)

Nevertheless, highly competent experts for the parties presented radically disparate conclusions on the issue. Their divergence reflects the different methodology and different concept of "value" employed by each side. The task of the Court is to determine which approach most faithfully accords with the statute and case law.

B. *Methodology*

As noted above, there are three generally-accepted methods of valuing property—(1) the replacement cost approach, (2) the market comparison approach, and (3) income stream or discounted cash flow analysis. Replacement cost measures the value of an asset by the cost to construct or replace it with another of like utility, taking into account depreciation in the asset to be valued. The market approach measures the value of an asset through analysis of recent market transactions involving comparable property. The income approach measures the value of an asset by the present value of its future earnings using discounted cash flow ("DCF") analysis. For purposes of this case, the replacement cost approach is subsumed into the market approach because the cost to replace spectrum licenses can only be determined by the cost of similar licenses auctioned by the FCC. As stated by the Bankruptcy Court in a

similar litigation between a C block licensee and the FCC, *GWI PSCI Inc., et al. v. Federal Communications Commission* (*In re GWI PSCI Inc., et al.*), Adversary No. 397-3492: "The market or comparable approach and the cost approach for these assets is basically the same. Comparables are based on auctions by the FCC. The only way to replace these licenses is by purchase at an FCC auction." (Transcript of April 24, 1998 at 13)

(1) *Market Comparable Technique*

The necessary predicates for employing the market comparable method of valuation are the existence of arm's length, marketplace transactions within a reasonably proximate time frame involving the same or basically comparable assets. The assets involved in the transactions to be compared need not be identical to the property to be valued. The test is whether the properties to be compared are sufficiently similar in nature and interchangeable in function that any differences can rationally be reflected by appropriate adjustments.[8]

NPCI's expert, Anthony P. Kern, employed the market comparable approach to value the C block licenses. Mr. Kern issued two reports, one valuing the assets as of January 13, 1997, the date the FCC announced the award of C block licenses to NPCI, the other valuing as of February 19, the date on which NPCI complied with

[8] For example, virtually every parcel of real estate differs from other parcels in some respects and, indeed, real property is frequently characterized as "unique" on a piece-by-piece basis. Yet the market comparable technique is traditionally accepted as the proper method of valuing real estate in most cases, using adjustments to reconcile differences between specific parcels.

its purchase price obligations by executing the Notes and delivering them to the FCC. Mr. Kern also issued a supplementary report (collectively with the January 13 and February 19 reports, the "Kern Report") correcting a calculation omission. It is NPCI's legal position that February 19 is the proper valuation date, although Mr. Kern's valuation for February 19 is higher than that for January 13.

Mr. Kern examined for potential comparability the A and B block licenses auctioned in early 1995, the D/E/F block licenses auctioned during the last quarter of 1996 and a number of PCS license transactions subsequent to these auctions. For reasons articulated in his report, Mr. Kern rejected the A/B block auctions and the subsequent PCS license transactions as comparables.

Mr. Kern selected the D, E and F block auction prices as appropriate comparables for his analysis. After applying adjustments which he deemed appropriate to account for material differences between the C block licenses, on the one hand, and the D, E and F block licenses on the other, Mr. Kern arrived at a reconciled fair market value per Pop for the C block licenses of $7.82, equating to a fair market value for NPCI's C block licenses of $810,358,264, rounded to $810.4 million.

(2) *Discounted Cash Flow Analysis*

Discounted cash flow analysis is a long-recognized and widely-used method of predicting or projecting value. If neither replacement cost nor comparative market can be utilized, DCF analysis may be the only practical way to evaluate property.

As employed by investment bankers and economists, DCF analysis entails the creation of a computer model incorporating on a line-by-line basis assumptions and projections of the myriad components of the overall market, market penetration and sales, revenues, costs, and the asset base and capitalization which support them, projected out over all relevant market conditions expected to prevail in a finite time period, in this case ten years. DCF analysis is widely if not universally used in the business and financial world as a tool to assist management in making decisions whether to invest in or dispose of businesses or major assets. It is generally not used as a tool for determining fair market value, particularly when that determination can be made using either replacement cost or market comparables. DCF analysis is obviously more reliable if the assumptions and line item components are based on actual, historical performance figures or contractual rights and obligations.

The FCC's expert, Dr. David J. Salant, prepared and relied upon a DCF model as the basis for his conclusion of value in his report (the "Salant Report"). Dr. Salant's valuation of NPCI C block licenses using a DCF model is presented in Part IV at pages 42-47 of the Salant Report, and the "Details on the Discounted Cash Flow Valuation of Next Wave's C Block Licenses" is to be found in Exhibit F to the Report. The entire remainder of the Salant Report and Exhibits is devoted to rebuttal addressed to the Kern Report. As stated by Dr. Salant:

> A good DCF model requires the analyst to think through, document and quantify each and every revenue, cost, multiple and discount rate. While the DCF approach may require the analyst to make "hundreds of assumptions," the discipline of the DCF approach in the hands of a knowledgeable practitioner means that those assumptions are logically consistent and reasonable. Indeed, one of the major advantages of the DCF approach is that another analyst can explicitly test the sensitivities of his or her result to changes in the assumptions. (Salant Report 43)

Dr. Salant continued:

> Any DCF analysis is subject to second-guessing because of the assumptions needed to complete the calculations. This DCF analysis has two main purposes: (1) to derive license values from a consistent and conservative set of assumptions based on our considerable experience in valuing PCS and cellular licenses, and (2) to compute a confidence interval, consisting of an extremely cautious lower bound and a moderately optimistic upper bound about how much a reasonable bidder/license buyer might be willing to pay for the licenses that NextWave won. The end result of our DCF analysis is a tool that allows us to perform a carefully considered estimate of the value of the licenses.
>
> We use the DCF to compute the maximum amount a very prudent firm would be willing to pay for the licenses. . . .
>
> No DCF analysis is perfect, and one can always debate the underlying assumptions. . . . Besides our own experience, our analysis uses industry sources and NextWave documents to form projec-

> tions of key variables such as penetration and average revenue per user. (Salant Report 44-45)

Under the heading "Summary Description of the DCF Model," Dr. Salant stated:

> The DCF model calculates revenues based upon information about wireless market penetration, PCS market penetration, minutes of use, retail revenue per user and wholesale revenue per user. Capital expenditures include cell site build-out and switching costs. Operating expenses include network related, marketing and billing expenses. For the base case we apply a 16% cost of capital, which is consistent with that used by NextWave in many of their DCF runs. (Salant Report 45)

In preparing his DCF analysis, Dr. Salant did not undertake to prepare and document the "hundreds of assumptions" customarily required for a DCF analysis in the business and financial world. Exhibit F to the Salant Report, entitled "Details on the Discounted Cash Flow Valuation" consists of a bar chart backed up by three sheets. The first sheet entitled "Free Cash Flow" contains the following line items: EBITDA, Taxes, FCC License Payment, Capital Expenditures, Change in Working Capital, and a resulting bottom line entitled Unlevered Free Cash Flow. The second sheet entitled "Equipment Costs" contains two categories, Non Recurring Costs (BTS Cost, Carrier Cost, Switch Cost and Switch Capacity Per Subscriber) and monthly Recurring Costs (BTS Site Cost, Carrier Cost, Switching Cost). The third sheet entitled "Key Baseline Values" contains eleven line items (Total Population, Covered Pops, PCS Company Subscribers, Basic Minutes Per User, PCS Average Revenue Per User, Data Service

Percentage of PCS Service Revenue, Capital Expenditures per Pop, Operating Expense per Pop, # BTS, # Carriers and # BSCs), and sets forth three additional assumptions, Number of Competitors at 6, Cost of Capital at 16% and Terminal Value Multiplier at 9. All line item projections on all three sheets are extended ten years from 1997 through 2006.

Once the DCF model has been created, its production of a number for value is a mathematical computation by the computer. The computation obviously will change to reflect any change in the assumptions in the model.

Dr. Salant's DCF model produced a "retail base case" value of approximately $2.5 billion as reflected on the bar chart in Exhibit F to his Report. Dr. Salant reasoned, however, that NextWave's strategy was to become a "carrier's carrier" and to market its PCS services to other providers, such as OmniPoint (with which NextWave had a marketing contract), which would in turn sell to the retail market. To reflect the value of this strategy inherent in NextWave's C block licenses Dr. Salant calculated the "wholesale base case" in the second column of the bar chart by simply eliminating from the model all costs associated with the retail part of the business. The DCF model then calculated a wholesale base case value at $31.46 per Pop, equating to approximately $3.3 billion as the value of the 110 Pops covered by NPCI's 63 C block licenses. The remaining four bars on the chart escalating to just over $8 billion showed calculations produced by the model using four modified assumptions (*viz.*, reduced build-out costs, five wireless competitors instead of six, increased data revenues, lower cost of capital).

(3) *The Meaning of Value*

The parties' experts differed profoundly not only on their conclusions as to value but on the very meaning of the "value" which each sought to quantify.

Mr. Kern sought to determine "fair market value," which he defined as "the amount at which the subject assets would change hands between a willing buyer and willing seller, in an arm's length transaction, in which both buyer and seller have reasonable knowledge of the relevant facts, and neither is under compulsion to complete the transaction." (Kern Report 1, 42) Central to Mr. Kern's conclusion is the premise that the spectrum auctions conducted by the FCC met the criteria embodied in the quoted definition of fair market value and that the prices bid at those auctions constituted the fair market values of the licenses sold as of the respective dates of the auctions. Thus, it was Mr. Kern's view that the D/E/F block auction which concluded in mid-January 1997 established the fair market value of those licenses at that time.[9] On the further premise that the C block licenses were functionally the same assets as the D/E/F block licenses, assuming various adjustments to account for differences between the various licenses, Mr. Kern concluded that the value per Pop of the C block licenses was equal to the price per Pop of the D/E/F block licenses after adjusting that price to reflect the differences between those licenses and the C block licenses.

---

[9] Consistent with this premise, the debtor concedes that the fair market values of the C block licenses were equivalent to the bids accepted by the FCC at the close of the auction and the reauction in May and July 1996, as of those dates.

By contrast, Dr. Salant does not recognize the concept of fair market value as defined by Mr. Kern, and he testified that "fair market value" is not a term used by economists such as he. Price, whether established in a public auction or in a private, arm's length negotiation, is not the same as value, as Dr. Salant conceives of value. "[I]t is well-established that auction prices, especially in complex procedures, can and do depart from any notion of 'value.'" (Salant Report 5) Dr. Salant describes what he perceives as "the fundamental difference between *value* and *price*" (*id.* at 7, emphasis in original). Dr. Salant states: "We use the DCF to compute the maximum amount a very prudent firm *would be willing to pay* for the licenses" (*id.* at 44, emphasis supplied), and in his testimony Dr. Salant repeatedly described "value" as a measure of "willingness to pay." Explaining the difference between value and price in the context of an auction, Dr. Salant observed that frequently the winning bidder will pay far less than the bidder's true valuation of the asset depending upon the level of competition presented by competing bidders. Indeed, it would appear that a buyer would never intelligently pay the full "value" which he ascribed to property in his DCF model, since one would never pay now the full value which the model would predict could only be earned over a span of years if all of the assumptions built into the model proved to be correct. Thus, the "value" produced by a DCF model is what a prudent buyer ought to be willing to pay for an asset based upon the assumptions embodied in the model, without regard to actual prices in the marketplace for similar property.

C. *Conclusions on Methodology*

The FCC's expert witnesses challenged the market comparable analysis relied upon by the debtor on two basic grounds, one focusing on the perceived non-comparability of the *auctions* and the other on alleged non-comparability of the *licenses.*

First, the FCC argued that the C block auction represented a different business opportunity than the D/E/F block auction and, consequently, that the C block auction attracted far more competition and hence generated higher prices. The theory of the FCC experts was that the C block auction was the last opportunity for an operator to establish a "national footprint" with 30 MHz of spectrum to compete with the major players such as AT & T, Sprint and Nextel, and that the D/E/F block auction was intended merely as a means for "incumbents" to "fill in the gaps" in their 30 MHz systems.

One might debate this theory[10] if it were relevant, but it is not. There is no dispute that the C block

[10] Although the C block auction obviously did present a "different business opportunity" from the D/E/F block auction, it is questionable whether either the experts who devised the PCS auction process or the participants viewed the C block auction as an opportunity for the development of a truly national footprint to compete with the nationwide coverage of the major wireless operators such as AT & T, Sprint and Nextel. The C block auction was open only to entrepreneurial, small businesses and rural telephone companies with very limited capital resources. Moreover, the FCC regulations precluded any C block bidder from acquiring more than 98 licenses, 20% of the 493 licenses auctioned, thus precluding the acquisition of a truly national footprint. The most successful C block bidder, NPCI, acquired only 56 licenses in the initial auction and an additional seven licenses in the reauction. By contrast, AT & T, Sprint and Nextel all covered virtually the entire nation through a combination of cellular, PCS, ESMR and other spectrum.

auction, in which 255 qualified bidders competed for 493 BTA licenses, was far more competitive than the D/E/F block auction, in which 153 qualified bidders competed for 1,479 BTA licenses, and that the prices bid for the C block licenses were exponentially higher than the prices bid for the D/E/F block licenses on a comparative MHz-Pop basis. The difference in the nature and competitiveness of the two auctions may explain *why* the C block bid prices were higher than the D/E/F block prices,[11] but *why* is not the issue. The issue before the Court is whether the C block licenses were sufficiently comparable to the D/E/F block licenses that the prices bid in the D/E/F block auction reflected a revaluation of the C block licenses *as perceived in the marketplace.*

[11] Many reasons for the radical decline in the perceived value of PCS spectrum were suggested at trial, including the difference in business opportunity emphasized by the FCC experts, the proposition that the C block bidders simply misjudged the market and grossly overbid in a frenzy of speculation, the sharp decline in the stock market prices of other companies in the wireless telecommunications business during the latter half of 1996 (the stock of OmniPoint, described by a witness as the "poster child" of public wireless operators, lost three-quarters of its value from May 1996 to April 1997) and the widespread concern or belief that the FCC had determined to remove the scarcity factor from the value of PCS and other wireless spectrum by flooding the market with spectrum through the D/E/F block auction and the auctions in 1997 for ESMR, WCS and LMDS spectrum, all of which were announced in the latter half of 1996. Undoubtedly all of these factors contributed to the decline in the perceived value of spectrum for wireless telecommunications.

On this issue it was Dr. Salant's view that the C block prices might have been just as high if that auction had been held in early 1997. He stated:

> Indeed, there is little reason to believe that had the C block auction been run, say over two or three months ending in January or February of 1997, with the same sets of bidders and the same initial eligibilities, that prices would have been much different. (Salant Report 30)

The evidence refuted that supposition. Of course, there was no auction for C block licenses in early 1997, but there was a market to test the value of those licenses—the market for public financing. If the market had indeed perceived the value of the C block licenses in January/February 1997 to be what the auction winners bid in May and July 1996, there is no reason to doubt that NextWave and the other C block licensees would have succeeded in raising the $1.6 billion of debt and equity they needed in the public market. The trial testimony on this issue of the NextWave representatives and their independent investment bankers was entirely credible. That evidence demonstrated that by January 1997 the market did not believe in the values bid in the C block auction. In meetings with the investment banking community, these witnesses found that the primary obstacle to funding NextWave's capital requirements was the perception based on the D/E/F block auction that the cost of the C block licenses was grossly excessive and that NextWave could not compete with that cost structure and debt burden. Despite the best efforts of these witnesses and others to convince the financial markets that C block licenses were different from and far more valuable than D, E

and F block licenses (using many of the same arguments advanced by the FCC at trial), they failed to do so, and no C block licensee could obtain any public funding.

Thus, lack of comparability of the two auctions may explain why the C block bid prices were higher than the D/E/F block prices, but it does not answer the question whether the D/E/F block auction and other factors such as mentioned in footnote 11 undermined the market value of the C block licenses. The fact is that the market's perception of the value of PCS licenses had changed by 1997. The FCC's 1999 reauction of C, E and F block licenses (predominantly C block licenses) demonstrated that the market value of this spectrum has declined even further.

The FCC challenged the comparability of the C block licenses and the D/E/F block licenses in only one respect—capacity. The FCC's experts presented a plethora of data designed to show the differences in capacity of a 30 MHz C block license and a 10 MHz D/E/F block license. They demonstrated that 10 MHz of spectrum is divisible into three usable channels, while 30 MHz can support eleven channels. With the sustained and rapid growth in mobile telephone ownership and usage and the likely advent in the coming years of "local loop service" and wireless data transmission,[12] capacity provided by 10 MHz will become insuf-

---

[12] "Local loop service" refers to customer usage of wireless mobile telephones in virtual replacement of traditional stationary telephones in the home and office. The experts do not anticipate that local loop wireless service will supplant traditional fixed point telephones unless and until monthly rates for wireless usage are brought down to levels competitive with high volume usage (say,

ficient to service demand. The debtor's witnesses countered by pointing to the sufficiency of 10 MHz for operations in even the most populous markets even today, more than two years after the February 1997 valuation date, and the virtual certainty that a continuation of market adjustments[13] and technological improvements and innovations[14] to increase 10 MHz capacity, known to the market in late 1996 and early 1997, will substantially accommodate all but the most radical increases in demand that might be expected six, seven or eight years in the future. Any capital costs to be incurred five or more years in the future to implement technological innovations to increase 10 MHz capacity must be weighed against the immediate and ongoing capital cost of carrying, or "warehousing," 30 MHz of capacity more than two-thirds of which is not needed now and which may become technologically obsolete before it is ever put to use.

1,000 minutes or more per month) on fixed point telephones. With existing technology, wireless transmission of data uses a great deal of spectrum capacity. But, there is little demand for wireless transmission of data today, and the evidence at trial would not support any finding as to the likelihood of a material increase in demand for wireless data transmission within the next five years.

[13] Since capacity planning must be geared to maximum demand on a telephone system, the quantification of peak demand is an essential factor in capacity. The FCC's experts quantified peak demand at 12 1/2% in calculating when 10 MHz capacity might be exhausted in the future. The debtor's witnesses countered by pointing out that the 12 1/2% figure was predicated on historic mobile telephone usage during commuting hours, primarily at the end of the day, when most mobile phones were car phones. The advent of small, highly portable mobile phones has not only increased overall wireless telephone usage, it has also spread that usage over the entire day and weekends, thereby decreasing the peak demand factor to 8 1/2% despite the increase in overall wireless usage.

[14] Such technological improvements include the greater efficiencies resulting from the various digital technologies (the most efficient of which appears to be CDMA), which may be replaced by even greater efficiency of 3G technology; utilization of eight kilobit EVRC vocoders in place of 13K vocoders; utilization of six sector in place of three sector antennae.

Considering all of the evidence, I conclude as a matter of fact and law that the C block licenses were substantially comparable to the D/E/F block licenses in February 1997 for purposes of determining the value of the former based upon the auction prices of the latter. The D/E/F block auction determined the fair market value of those licenses as of the time of the auction. The D/E/F block auction concluded precisely at that point in time when the C block licenses are to be valued. The C block licenses are functionally identical to and interchangeable with the D/E/F block licenses in every respect, save only capacity. All 493 licenses in each of the C, D, E and F blocks covered precisely the same geography and population in the same BTAs. With respect to capacity, the undisputed evidence showed that even at the time of trial in April 1999 no PCS operator is using more than 10 MHz of spectrum in even the most densely populated BTA; indeed, no PCS operator is using more than two of the three channels available in 10 MHz in any BTA. Knowledgeable participants in the PCS market and their financiers knew in February 1997 that demand might exceed 10 MHz capacity in the most populous BTAs at some point in the perhaps distant (five years or more) future, and they also knew that technology existed even then which might expand 10 MHz capacity to meet any reasonably projected demand. These findings do not mean that there was no difference between 10 MHz and 30 MHz of

spectrum; they do mean that the C block licenses and the D/E/F block licenses were comparable for market valuation purposes, subject to appropriate adjustment for the capacity difference between 30 MHz and 10 MHz which might or might not become material at some point in the future depending upon market conditions, which might increase demand beyond 10 MHz capacity, and technological advances, which might expand 10 MHz capacity to meet demand.

Accordingly, I conclude that Mr. Kern's market comparable analysis is an appropriate method of determining the value of C block licenses in February 1997, subject to appropriate adjustments, discussed below.

The market comparable method of valuation satisfies two key legal requirements. First, valuation by reference to actual market prices in a public auction open to every potential purchaser in the marketplace and conducted under FCC regulations designed to provide every bidder with maximum possible competitive information establishes "fair market value" of the property auctioned as a matter of law. *Keener v. Exxon Co., USA*, 32 F.3d 127, 132 (4th Cir. 1994), *cert. denied*, 513 U.S. 1154, 115 S. Ct. 1108, 130 L.Ed.2d 1074 (1995) (bid price equated to fair market value). The *Keener* court explained:

> [F]air market value is, by necessity, best set by the market itself. An actual price, agreed to by a willing buyer and willing seller, is the most accurate gauge of the value the market places on a good. Until such an exchange occurs, the market value of an item is necessarily speculative.

Id. (citing *Amerada Hess Corp. v. Commissioner of Internal Revenue*, 517 F.2d 75, 83 (3d Cir. 1975)). "[W]hen a third party makes an offer in cash, or its equivalent, for an item, a 'court can justifiably infer that the amount of an arms' length offer represents the value of the [asset]." *Id.* at 132 n.5 (citing *Ellis v. Mobil Oil*, 969 F.2d 784, 786 (9th Cir. 1992)). Fair market value is the price which a willing buyer would pay a willing seller in an arm's length transaction, where both the buyer and seller have reasonable knowledge of the relevant facts and neither is under compulsion to complete the transaction. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 548, 114 S. Ct. 1757, 128 L.Ed.2d 556 (1994); *In re Grigonis*, 208 B.R. 950, 955 (Bankr. D. Mont. 1997). *See also, In re Prince Gardner, Inc.*, 220 B.R. 63, 66 (Bankr. E.D. Mo. 1998) (citing *BFP*, 511 U.S. at 548, 114 S. Ct. 1757 ("[i]n the vast majority of asset transfers other than real estate foreclosure sales, the Bankruptcy Courts can determine worth and reasonably equivalent value by referring to the common-law notion of fair market value")); *see also Barber v. Golden Seed Co., Inc.*, 129 F.3d 382, 387 (7th Cir. 1997); *In re R.M.L. (Mellon Bank v. Official Committee of Unsecured Creditors)*, 92 F.3d 139, 149 (3d Cir. 1996); *In re Ozark Restaurant Equipment Co., Inc.*, 850 F.2d 342, 345 (8th Cir. 1988); *In re Colonial Realty*, 226 B.R. 513, 523 (Bankr. D. Conn. 1998); *In re O'Neill*, 204 B.R. 881, 887 (Bankr. E.D. Pa. 1997) (reasonably equivalent value means fair market value outside foreclosure context); *In re Grigonis*, 208 B.R. at 955. Fair market value, as defined by Mr. Kern in his Report and as established in the D/E/F block auction, is the legal standard for determining value in a proceeding to determine whether there has been a constructive fraudulent conveyance. *Morris Communications*, 914 F.2d at 469

(quoting *United States v. 100 Acres*, 468 F.2d 1261, 1265 (9th Cir. 1972)) ("[T]he method of 'comparable sales' in the relevant time frame is 'more appropriate than any other method in determining market value of the property.'"); *El Paso Natural Gas Co. v. Federal Energy Regulatory Comm'n*, 96 F.3d 1460, 1464 (D.C. Cir. 1996) ("evidence of contemporaneous sales of comparable properties is generally the preferred method of valuation"); *In re Martin-Trigona*, 760 F.2d 1334, 1345 (2d Cir. 1985); *Cowen v. Guidry*, 274 F. Supp. 22, 24 (E.D. La. 1967) (there is no justification for using income approach to fair market value where comparable sales are available); *In re General Industries, Inc.*, 79 B.R. 124, 128 (Bankr. D. Mass. 1987) (under the circumstances at issue the court found the "market data method is the most practical method approach to valuation"); *In re Thompson*, 18 B.R. 67, 70 (Bankr. E.D. Tenn. 1982) ("It is generally recognized that comparable sales in the vicinity of the subject property produce the best guides to determine fair market value").

Second, the market comparable method comports with the requirement that value be determined in bankruptcy proceedings by an objective standard. *In re Independent Clearing House Company*, 77 B.R. 843, 859 (D. Utah 1987); *In re Taubman*, 160 B.R. 964, 986 (Bankr. S.D. Ohio 1993); *In re Morton Shoe Companies, Inc.*, 24 B.R. 1003, 1009 (Bankr. D. Mass. 1982); *In re Richardson*, 23 B.R. 434, 444 (Bankr. D. Utah 1982); *In re Checkmate Stereo and Electronics, Ltd.*, 9 B.R. 585, 591 (Bankr. E.D.N.Y. 1981), *aff'd*, 21 B.R. 402 (E.D.N.Y. 1982).

The same conclusions cannot be reached with respect to the DCF method of valuation relied upon the FCC. The DCF method suffers from four fundamental defects for purposes of valuing the C block licenses in this proceeding.

First, the income method of analysis values an enterprise as a totality; it does not value any particular element of property within the enterprise. A PCS license by itself cannot generate any income. Only an enterprise can generate income, and the enterprise consists of congeries of assets, management, a business plan, production and service employees and financing, and the enterprise exists in the context of a marketplace consisting of customers, competitors and regulators. Every element just mentioned has associated with it a number for every point in time, and all of those numbers must be included in the DCF model to calculate a value. The value so determined is the value of the enterprise, not any particular asset within it.

Second, in a case such as this the constituent elements incorporated in a DCF model for the mathematical calculation of value are not objectively ascertainable facts in the real world, as are comparable sales and market prices. Every single line item in Dr. Salant's DCF model is an assumption utilized to calculate a projection, from which is mathematically extrapolated a net present value. The gap in reliability between objectively verifiable facts used in the market comparable methodology and the assumptions used in this kind of DCF analysis is compounded in the case of a start-up enterprise such as NextWave, where there is no record of historical performance on which to base assumptions for future projections. *See, Langham, Langston &*

Burnett v. Blanchard, 246 F.2d 529, 532 (5th Cir. 1957) (valuation of a company as a going concern is inappropriate when the business is wholly inoperative or on its deathbed); *In re Fred D. Jones Co.*, 268 F. 818 (7th Cir. 1920), *cert. dismissed, Heldman v. Central Trust Co. of Illinois*, 257 U.S. 664, 42 S. Ct. 45, 66 L.Ed. 424 (1921); *In re Art Shirt Ltd., Inc.*, 93 B.R. 333, 341 (E.D. Pa. 1988) (to treat a wholly inoperative or defunct company "as a going concern would be misleading and would, in fact, fictionalize the company's true financial condition"); *In re Bellanca Aircraft Corp.*, 56 B.R. 339, 387 (Bankr. D. Minn. 1985). The problem is exacerbated with the DCF analysis relied upon by the FCC in this case. The textual description of Dr. Salant's DCF model at pages 42-46 of the Salant Report and in the three remarkably spare spreadsheets comprising Exhibit F to that Report are by no means self-explanatory, intuitively comprehensible or objectively verifiable by the trier of fact. We know only that the DCF model was created by Dr. Salant and his assistants and, as to the sources of their assumptions, the statement: "Besides our own experience, our analysis used industry sources and NextWave documents to form projections of key variables such as penetration and average revenue per user." (Salant Report 44-45)[15]

[15] The reason for concern as to the reliability of a valuation predicated entirely on unverifiable, subjective assumptions is readily illustrated. For example, a variation of 1% in the presumed weighted average cost of capital (WACC) results in a $500 million change in the value calculated by Dr. Salant's DCF model. Changing the assumption of wireless competitors from six to five increases Dr. Salant's calculation of value by $1.5 billion. The modification of the "retail base case" value of $2.5 billion to produce the "wholesale base case" of $3.3 billion (relied upon by the FCC as the value of NPCI's 63 C block licenses) by the simple

Third, whatever uncertainties one may have with regard to the assumptions built into the DCF model by Dr. Salant and his associates, there can be no uncertainty that one key assumption of the model conflicted with reality. The model assumed the existence of financing to build out the necessary infrastructure to conduct a PCS wireless business using C block licenses. In the real world, however, not a single C block licensee was able to obtain financing to build out its system, precisely because of the financial community's concern as to the value of the C block licenses. This single fact undermines the utility of the model. It is not an answer to say that the model is designed to demonstrate a hypothetical value, because the law requires a determination of fair market value, not hypothetical value.

Finally, as acknowledged by Dr. Salant his DCF methodology is not designed to produce a calculation of "fair market value" as defined by appraisers and the courts. Dr. Salant disclaimed fair market value as a concept employed by economists and as an objective of DCF analysis. Dr. Salant's concept of value is something quite independent of the price which a fully informed seller and buyer would accept and pay in an arm's length, unconstrained transaction. DCF analysis is undoubtedly an essential tool for economists and financial analysts to assess risk in a proposed transaction or strategy by calculating the differences in value produced by manipulating the assumptions built into the model. But such "values" are hypothetical and cannot be used to supplant the market comparable method

expedient of deleting from the model all costs associated with retail appears to implicate the anomalous result of a negative value of $800,000 associated with the retail side of the business.

to determine current "fair market value" in circumstances, such as presented here, where market value can be determined by reference to the prices paid in actual, contemporaneous transactions involving comparable properties.[16]

For the foregoing reasons, I must reject the DCF methodology relied upon by the FCC.[17]

D. *Conclusions on Value*

This Court's decision on the FCC motion for partial summary judgment left open the question whether the C block licenses should be valued with an effective date as of January 3, 1997, the date on which the FCC issued its ruling conditionally awarding the C block licenses to NPCI, or February 19, 1997, the date on which NPCI executed and delivered the Notes to the FCC. I conclude as a matter of law that February 19 is the appropriate date for valuation, because it was not until NPCI complied with its purchase price obligation by

---

[16] In other circumstances the income method of valuation may be preferred, such as where there are no truly comparable transactions and income is objectively verifiable as a basis to determine present value based on highly reliable projection of future net income.

[17] Mr. Kern's reasons for rejecting the income approach to valuation were concisely stated in his Report at page 43:

> The income approach was considered but not utilized because of the uncertainty in projecting typical build-out costs, subscriber growth, operational expenses, changes in ARPU [average revenue per user], effects of competing technologies and numerous other factors necessary for a start- up company in a developing industry. Additionally, the income approach assumes a fully financed company holding the licenses and an operating network generating cashflow.

delivering the Notes that the transfer occurred and the obligation was incurred.

As noted above, the Kern Report valued NPCI's 63 C block licenses at $810,400,000 based on the prices bid at the D/E/F block auction after giving effect to certain adjustments to the latter prices to reflect differences between the respective licenses. The FCC experts took exception to these adjustments in several respects, each of which will be considered.

Competition Adjustment. The FCC argued that there should be a "competition" adjustment because of the fact that the C block auction was more competitive than the D/E/F block auction (far more bidders, having submitted far higher upfront payments, competing for one-third the number of licenses). The argument must be rejected for two reasons. First, as explained above the market comparable approach looks not to the comparability of sales events but to the comparability of the things being sold. Thus, there is no need to make adjustment to reflect differences between the auctions. Second, it is self-evident that the difference in competitiveness between the two auctions is fully reflected in the differences in the prices bid—indeed, the bid differential is precisely the consequence of the greater competitiveness of the C block auction.

30 MHz/10 MHz Multiple. Although 10 MHz provides sufficient capacity presently and, in many or most BTAs, for the indefinite future, there is little doubt that 30 MHz capacity may have significant economic value in years to come in high population BTAs, for which NPCI holds eleven C block licenses. This would suggest an adjustment of 3 to 1 for the eleven high Pop licenses and no adjustment (*i.e.*, a 1 to 1 ratio) for the 52 licenses

where 30 MHz appears unlikely to add value to a 10 MHz license. Technological arguments exist which may justify a higher than 3 to 1 ratio (*e.g.*, eleven channels for 30 MHz versus three channels for 10 MHz suggests a 3.67 to 1 ratio; "trunking factor" suggests a 4.5 to 1 ratio). However, applying even a 4.5 to 1 ratio to the eleven high Pop licenses and a 1 to 1 ratio for the remaining 52 licenses produces a total value for all 63 licenses materially lower than $810.4 million. Considering all the factors bearing on the issue, I conclude that there is no basis to select an adjustment different from the 3 to 1 ratio which Mr. Kern applied to all 63 licenses.

Cost of Capital. C block licensees enjoyed significant advantages in respect of financing their purchase price obligations to the FCC, described above. F block licensees enjoyed different financing advantages, also described above, and D and E block licensees were required to pay the FCC in full in cash for their licenses. To adjust for the financing differentials Mr. Kern used an interest rate of 11.75%, being the median value of 1996 debt offerings of seven other PCS and cellular operators. However, all seven of the issuers, including Sprint and Western Wireless Corp., were relatively well-established, operating companies. Weighing the conflicting testimony of the experts and other evidence, I conclude that 11.75% represented an overly optimistic cost of money for a development stage company such as NextWave in February 1997, and that 14% is a more reasonable adjustment to reflect the financing advantages of the C block licenses compared with the D, E and F block licenses.

Percentage of Favorable Financing Adjustment. Although he concluded that an adjustment was necessary to reflect the favorable financing available to C block licensees, Mr. Kern applied only 60% of that adjustment, rather than 100% necessary to realize full equalization, reasoning that a purchaser of C block licenses in February 1997 probably would not be willing to pay an amount sufficient to reflect 100% of the financing differential. I agree with the FCC experts that the financing adjustment should be taken at 100% in order to fully reflect the value of the C block licenses where that value is to be derived from a comparison with the D, E and F block licenses.

Summary. Near the conclusion of the trial at the Court's request Mr. Kern recalculated the value of the 63 NPCI C block licenses in accordance with his market comparable methodology but utilizing a variety of different assumptions on the disputed adjustments, discussed above (*see* Plaintiff's Trial Exhibits 136, 143). Using February 19 as the effective date for valuation and applying the Court's conclusions with respect to the adjustments discussed immediately above (*i.e.*, a 3 to 1 ratio to reflect the MHz differential, a 14% cost of capital and 100% of the favorable financing differential) results in a calculation of $908,146,000 (*see* Exhibit 136 sheet 6, Exhibit 143 sheet 4). Accordingly, it is this Court's ruling that $908,146,000 was the fair market value of NPCI's 63 C block licenses as of February 19, 1997. By any standard this did not constitute reasonably equivalent value for $4.6 billion of Transfers.

Under this ruling the $908,146,000 figure represents the fair market value of 100% of the debtor's C block licenses. As such, it does not take account of the Court's ruling under section II.A., above, that the 3% Payment of $142,309,000 constituted a fair exchange of

value not subject to avoidance under Section 544. It is necessary to give effect to both rulings in calculating the total amount of NPCI's $4.7 billion of Transfers that is subject to avoidance under the statute. To this end it is appropriate to take 97% of the $908,146,000 figure, or $880,902,000, and add back the 3% Payment of $142,309,000. The sum, $1,023,211,000, may be said to constitute the fair market value of the entire consideration received by NPCI in exchange for the entire $4.7 billion of Transfers, for purposes of fraudulent conveyance analysis. The result of subtracting $1,023,211,000 from the $4,743,648,000 of total Transfers is $3,720,437,000, representing that portion of the total Transfers subject to avoidance under 11 U.S.C. §§ 544, 548 and 550.

The Court will conduct a further hearing to consider the question of remedy at the parties' earliest convenience.

APPENDIX K

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Bankruptcy No. 98 B 21529(ASH)
Adversary No. 98-5178A

IN RE NEXTWAVE PERSONAL COMMUNICATIONS, INC., ET AL., DEBTORS

NEXTWAVE PERSONAL COMMUNICATIONS, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

Feb. 16, 1999

DECISION ON PARTIAL SUMMARY JUDGMENT MOTION

ADLAI S. HARDIN, JR., Bankruptcy Judge.

Nextwave Personal Communications, Inc. ("Nextwave" or "debtor") commenced this adversary proceeding to set aside its aggregate $4.7 billion of transfers and obligations to the Federal Communications Commission ("FCC") incurred in its acquisition of 63 broadband Personal Communication Services licenses ("C Block licenses") as a constructive fraudulent conveyance under 11 U.S.C. § 544(b). The FCC has moved for partial summary judgment under Bankruptcy Rule

7056(b) to determine the effective date of Nextwave's $4.74 billion of transfers and obligations for purposes of Section 544(b). As set out below, I find that the effective date of the debtor's $4.74 billion of transfers and obligations under Bankruptcy Code Section 544 is January 3, 1997.

Jurisdiction

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and 157(a) and the standing order of reference of Acting Chief Judge Robert J. Ward dated July 10, 1984. This adversary proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(H).

Undisputed Facts

The following facts are undisputed by the parties. The FCC conducted an auction of C Block licenses from December 18, 1995 to May 6, 1996, and a reauction of C Block licenses from July 3 to July 16, 1996. The debtor participated in the bidding in both of these auctions and was declared the high bidder on May 8, 1996 for 56 C Block licenses and on July 23, 1996 for an additional 7 reauctioned C Block licenses, for a total of 63 C Block licenses.

As part of the FCC's auction process, bidders were required to deposit "qualifying amounts" in order to participate in the auction. The debtor deposited qualifying amounts of $79,225,000 on December 1, 1995 and $6,984,244 on June 13, 1996. After the debtor was declared the winning bidder on May 6, 1996 as to the 56 C Block licenses, it deposited an additional $130,834,333 on May 10, 1996 and further deposit of $20,138,825 on July 23, 1996 when it was declared the winning bidder

for the 7 C Block licenses. The debtor's deposits at the close of the bidding process totalled $237,182,402, or approximately 5% of the $4.7 billion it bid for all 63 C Block Licenses.

Following the close of the auction process, FCC regulations required the debtor to submit applications for approval of the issuance of the 63 C Block licenses. The debtor submitted applications as to the 56 and 7 C block licenses on May 22 and July 17, 1996, respectively. While these applications were pending, two rival bidders, Antigone Communications L.P. and PCS Devco, Inc., petitioned the FCC to deny the debtor's applications on various grounds. The FCC investigated the matter and found that certain elements of NextWave's capital structure exceeded statutory foreign ownership benchmarks. In response, the debtor filed a restructuring plan with the FCC on December 30, 1996 to bring its capital structure into compliance with FCC regulations. On January 3, 1997, the FCC conditionally granted licenses for all 63 C Block licenses, subject to the debtor's implementation of its proposed capital restructuring plan.

Following the FCC's January 3, 1997 license grant, the debtor was required to deposit an additional 5% of the total $4.74 billion bid price, or a further $237 million. The debtor deposited this additional amount on January 9, 1997, raising its total deposits to $474 million. On February 19, 1997 the debtor signed notes dated January 3, 1997 in the aggregate principal amount of $4.27 billion (the "Notes") for the balance of the $4.74 billion it bid at auction.

Discussion

The parties dispute the date on which the debtor incurred its $4.74 billion obligation to the FCC. That date is relevant for purposes of the debtor's avoidance claim under Bankruptcy Code Section 544(b), which provides in pertinent part:

> The trustee may avoid any transfer of an interest of the debtor in property *or any obligation incurred* by the debtor that is voidable under applicable law . . .

11 U.S.C. § 544(b) (emphasis added). Because the FCC has moved only for a determination of that date, this decision is limited to a finding of fact and conclusion of law as to that date and does not address any remaining factual or legal issues regarding the debtor's Section 544 claim.

The FCC argues that the debtor incurred its obligations when "the hammer fell" at the C Block auctions on May 8 and July 23, 1996. The debtor argues that it did not incur the obligations at issue in this proceeding until at least January 3, 1997,[1] the date on which the FCC conditionally granted the licenses and the effective date of the Notes.

The resolution of this motion must follow from identifying precisely which obligation the debtor seeks to avoid. Stripped to its essential proposition, the debtor's

---

[1] While it did not actually execute its Notes for the balance of its bid until February 19, 1997, the debtor does not contest using the effective date of the Notes, January 3, 1997. (Debtor's Memorandum at 8, note 2).

Section 544 claim is that it did not receive reasonably equivalent value in the C Block licenses it was granted in return for its $4.74 billion obligations. To measure the reasonable equivalence in value of the C Block licenses and the obligations incurred therefor, one must ask (i) when did the debtor receive the licenses and (ii) when did it become obligated to pay for them. These questions are determined by the rules governing the auction itself. *See In re Wilson Freight Co.*, 30 B.R. 971, 975 (Bankr. S.D.N.Y. 1983) (announced terms of auction binding upon participants). Those rules are found in the FCC regulations governing the auction process at 47 C.F.R. §§ 1.2101-1.2111, entitled "Subpart Q, Competitive Bidding Process."

With regard to question (i), both sides agree that the winning bidder neither received nor became entitled to receive the C Block licenses upon being declared the winning bidder under the FCC regulations. The winning bidder must apply to the FCC, complete the regulatory approval process and perhaps (as in this debtor's case) overcome objections. The winning bidder has no legal right to receive or utilize the licenses bid upon unless and until its application is approved by the FCC. All the debtor received on May 8 and July 23, 1996 when it was declared high bidder was the exclusive right to apply for the 63 licenses. As stated by the FCC's counsel at a hearing in this Court on January 28, 1999 (Tr. at 15):

> THE COURT: Wait a second. You're asking for words, namely, "reasonably equivalent value" and that raises a question of value for what? And equivalent to what?
>
> MS. SCHWARTZ: To what they got.

THE COURT: What did they get?

MS. SCHWARTZ: What they got was the right to apply for these licenses that were essential to their business. And without those licenses, they would have no business.

Thus, the debtor did not become entitled to receive the 63 C Block licenses until at the earliest the January 3, 1996 decision of the FCC granting the debtor's applications.

Under FCC regulations, once bidding has ended the FCC must notify the high bidder and declare bidding closed. 47 C.F.R. § 1.2107(a). Within five days of the notification, the winning bidder who is a "qualified designated entity" (as is the debtor) must bring its total deposits up to 10% of its bid as a downpayment. 47 C.F.R. § 1.2107(b). Significantly, once the downpayment is tendered, the FCC holds the downpayment:

> until the high bidder has been awarded the license and has paid the remaining balance due on the license, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable penalties.

Id. In other words, one of three events must occur after the winning bidder tenders the downpayment but before award of the license: either the winning bidder pays the balance of the bid, in which case the downpayment is applied toward the license, or the winning bidder defaults, or the winning bidder is disqualified. Significantly, if the winning bidder defaults or is disqualified, although penalties may be assessed under

Section 1.2104, the downpayment must be returned net of any penalties.[2]

Nor is the obligation on the full amount of the bid fixed upon tender of the downpayment. A winning bidder who timely submits its downpayment must also submit a "long-form" application for license approval in its respective areas of service. 47 C.F.R. § 1.2107(c). If the bidder fails to timely submit its application, it is deemed to have defaulted and is subject to Section 1.2104 penalties. *Id.* The bidder's default subjects it to applicable penalties to be subtracted from the downpayment, but does not leave the bidder liable on the full amount of the bid.

These provisions make it clear that the debtor was not legally bound on the full amount of its winning bid upon being declared the high bidder. At the "fall of the hammer" the debtor did incur a potential liability in the event that it either defaulted or was disqualified (neither of which occurred in this case), but under the FCC regulations that potential liability was quite different from the amount of the winning bid.

The potential default liability incurred at the fall of the hammer consisted of penalties calculated on the basis of the difference between the winning bid and the winning bid at any subsequent reauction if any, plus applicable percentage penalties. *See* 47 C.F.R. § 1.2104. Nothing in this calculation explicitly or implicitly binds

---

[2] It appears that one party in the bidding process, BDCPS, Inc., in fact failed to timely submit its downpayment, thereby defaulting, and was assessed a penalty in accordance with Section 1.2104, but there is no indication that the full amount of its high bid was assessed. (Exhibit J to debtor's Memorandum in Opposition).

the winning bidder to the full amount of its bid. Indeed, the express requirement that the downpayment be refunded less any penalties in the event of default or disqualification negates any implied liability for the full amount of the bid. The penalty obligations upon default or disqualification are entirely separate from—and mutually exclusive of—the obligations the bidder would incur upon granting of the license and tender of the balance of the bid. Whether the debtor might have been liable for any of these penalty amounts is not at issue.

Having determined that the debtor's liability for the full amount of the obligation did not attach upon its being declared the high bidder, nor upon tender of the downpayment or even submission of the license approval application, the issue remains as to when the full liability did attach.

The auction rules provide that the grant of a license is expressly conditioned upon payment of the balance of the obligation. Section 1.2109(a) provides:

> Unless otherwise specified in these rules, auction winners are required to pay the balance of their winning bids in a lump sum within five (5) business days *following award of the license. Grant of the license will be conditioned on full and timely payment of the winning bid.*

47 C.F.R. § 1.2109(a) (emphasis supplied). If the bidder fails to satisfy Section 1.2109(a), the license application is deemed dismissed, the bidder is liable for Section 1.2104 penalties against the downpayment, and the FCC may either reauction the license or offer it to the next highest bidder. 47 C.F.R. § 1.2109(b). Similarly, any bidder who is found unqualified, defaults in timely remitting the balance of the bid or is disqualified becomes liable for Section 1.2104 penalties, after which the FCC may conduct a new auction. *Id.* Taking these sections together, had the debtor failed to tender the balance or otherwise defaulted, it would have been liable only for the Section 1.2104 penalties against its downpayment. Thus the earliest date at which the debtor could have been liable for the full amount of its bid obligations is the date it complied with Section 1.2109(a) by paying the balance of its cash obligations and issuing the Notes. The debtor complied with Section 1.2109(a) effective at the earliest on January 3, 1996 by tendering the balance of its bids in cash and the Notes. It thereby became liable for the full amount of its bid obligations by reason of its Notes.

To summarize, under the FCC regulations it is clear that the debtor incurred a contingent liability for default by entering into the bidding process and by being declared the high bidder. However the contingent default obligations that the debtor might have incurred by participating in the bidding process (which were never actually incurred by the debtor) were quite different from the debtor's obligations for the full amount of its bids, which only became fixed upon its tender in cash and the Notes of the balance due on the C Block licenses granted on January 3, 1997. That obligation, not the contingent penalty obligations, is the subject of the debtor's Section 544 avoidance action.

It is apparent that the FCC's position on this motion is incongruent both with its own regulations and with the debtor's claim in this adversary proceeding. The

constructive fraudulent conveyance claim asserts that the aggregate consideration given by the debtor effective January 3, 1997 for the 63 licenses (*i.e.*, the cash transfers totalling $474 million and the Notes totalling $4.26 billion) was not reasonably equivalent to the value of the licenses granted on January 3, 1997. In arguing that May 8 and July 23, 1996 are the debtor's liability dates for valuation purposes, the FCC focuses not on the actual $4.7 billion purchase price which became effective January 3, 1997, but on the debtor's contingent exposure to default penalties which were never incurred and never could be incurred if the licenses were granted. Moreover, the property to be valued—the licenses—was not granted in May and June 1996, but on January 3, 1997.

For the foregoing reasons, I find as a matter of fact and law that the date upon which the debtor incurred its obligations to the FCC for purposes of Bankruptcy Code Section 544(b) is January 3, 1997.[3]

Counsel of the NextWave and the FCC are directed to confer and jointly prepare an order, agreed as to form, consistent with this decision, without prejudice to the FCC's right to appeal.

---

[3] The January 3, 1997 date is based upon the date of the FCC's decision granting the licenses and constitutes the earliest effective date of the debtor's obligations for purposes of this adversary proceeding under Section 544. This ruling is without prejudice to the right of either party to argue that a later date should be determinative if the difference is material.

* * *

APPENDIX L

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Bankruptcy No. 98 B 21529(ASH)
Adversary No. 98-5178A

IN RE NEXTWAVE PERSONAL COMMUNICATIONS, INC., ET AL., DEBTORS

NEXTWAVE PERSONAL COMMUNICATIONS, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

Dec. 7, 1998

REVISED DECISION ON MOTION TO DISMISS

ADLAI S. HARDIN, JR., Bankruptcy Judge.

Defendant Federal Communications Commission ("FCC") has moved to dismiss this adversary proceeding for lack of subject matter jurisdiction.[1]

The First Amended Complaint of plaintiff-debtor NextWave Personal Communications, Inc. ("Next-

---

[1] The District Court denied the FCC's companion motion to withdraw the reference, remanding the motion to dismiss to this Court for decision.

Wave" or the "debtor") contains two causes of action. The first alleges that NextWave's transfers to the FCC of deposits and secured promissory notes aggregating $4.7 billion in exchange for conditional grants of 63 C block lines on January 3, 1997 were constructive fraudulent conveyances subject to avoidance under 11 U.S.C. § 544. The second cause of action alleges that, by reason of the FCC's *de facto* control over NextWave and its "inequitable, unconscionable and unfair conduct" from the time of the C block auctions through the conditional grant of licenses on January 3, 1997, the FCC's liens and claims should be equitably subordinated to the claims of other creditors in the case, including intercompany and affiliate claims.

The motion to dismiss will be denied as to the first cause of action and granted as to the second. As amplified below, the first cause of action arises solely out of the FCC's status as a creditor of NextWave and does not seek to challenge any act or omission of the FCC or to affect the FCC in any manner except in its capacity as a creditor. By contrast, the second cause of action is based upon conduct of the FCC acting in its regulatory capacity. This Court will decline to review or adjudicate the consequences of the FCC's acts and omissions in matters over which Congress has granted the FCC primary jurisdiction.

Jurisdiction

This Court has jurisdiction over the debtor's Chapter 11 case by reason of 28 U.S.C. §§ 1334(a) and 157(a) and the standing order of reference dated July 10, 1984 signed by Acting Chief Judge Robert J. Ward. This Court's jurisdiction with respect to the claims asserted

in the adversary proceeding is the subject of this decision.

Background[2]

As set forth in the FCC's main memorandum, prior to Congress' enactment of Section 309(j) of the Federal Communications Act ("FCA"), the House Committee on Energy and Commerce (the "Committee") recognized that the radio frequency spectrum is a "precious but limited resource [that] has become vitally important to our economic success and social well being." *See* H.R. Rep. No. 103-11 at 247-48 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 574-75. Noting that the congested state of the radio frequency spectrum limited the ability to accommodate new spectrum-dependent technologies and that existing procedures for issuing radio spectrum licenses by lottery and comparative hearings had resulted in regulatory inefficiencies and permitted licensees to exploit a national resource unjustly, the Committee concluded

> that a carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to

---

[2] The facts set forth below are drawn from the parties' briefs and the First Amended Complaint. The factual recitation which follows does not constitute "findings of fact" but is intended to provide the factual matrix giving rise to the parties' dispute in order to give context for the decision below. While the parties may differ on particular points of fact referred to herein, it is the Court's view that such differences would not be material to the ultimate factual and legal issues presented on this motion to dismiss.

compensate the public for the use of the public airwaves.

Id. at 580.

In section 309(j) of the FCA Congress authorized the FCC to issue radio spectrum licenses to various categories of qualified applicants through a system of competitive bidding. 47 U.S.C. § 309(j)(1), (2). Among the categories of applicants, the FCC was directed by the statute to designate portions or "blocks" of the radio spectrum for auction to small, emerging businesses and to establish flexible, deferred license payment plans to enable such enterprises to participate in the communications industry. 47 U.S.C. § 309(j)(3)(B) and (4)(D). Consistent with this mandate, the FCC designated the C block for auction to small businesses providing Personal Communications Services ("PCS"), a new form of wireless communication technology.

On May 6 and July 16, 1996, the FCC conducted its C block auctions, in which some 90 bidders won the right to apply for 493 C block licenses at bid prices aggregating $10.2 billion. As mandated by the statute, successful bidders were obligated to pay 10% of their winning bids in cash and to pay the remaining 90% to the FCC in deferred installments. Consistent with the statutory mandate, the FCC enacted regulations authorizing payment of the remaining 90% over a period of ten years, with interest only for the first six years and principal and interest for the remaining four years. 47 C.F.R. § 24.711(b)(3). Below-market interest rates were provided to enable start-up companies to obtain financing through capital markets or private placement in order to make debt payments to the FCC and to "build out" their PCS networks.

NextWave is a start-up company organized to take advantage of the opportunities provided by section 309(j) in the fledgling PCS industry. NextWave was high bidder for a total of 63 C block licenses for amounts aggregating approximately $4.7 billion. As required, NextWave made 10% downpayments aggregating some $474 million. In late May and late July 1996, following the auctions in those months, NextWave submitted applications for the C block licenses upon which it was the winning bidder for review and approval by the FCC.

On September 17, 1996, C block licenses were granted to over 90% of the parties who had earlier been designated as making high bids for licenses in the C block. The FCC did not grant approval for NextWave's 63 C block licenses until January 3, 1997. Shortly thereafter, NextWave received from the FCC a series of promissory notes made payable to the FCC (the "Notes") aggregating $4.26 billion, representing the remaining 90% of the amount bid by NextWave for its C block licenses. NextWave executed the Notes on February 19, 1997.

On June 26, 1996 the FCC announced the date for commencement of the D, E and F block auctions, which were held on August 26, 1996 and concluded in January 1997. These blocks covered geographical areas across the country, including areas covered by the 63 C block licenses for which NextWave was awaiting FCC approval. The winning bids on the D, E and F block auctions were at a fraction of the winning bids in the C

block auction.[3] The drastic devaluation in the C block licenses, as reflected in the values of the subsequently bid D, E and F block licenses, is the central factor in the NextWave bankruptcy filing and in the debtor's adversary proceeding against the FCC.

As a consequence of the gross disparity between the values of the C block licenses and those of the D, E and F block licenses, many if not most or all of the C block licensees experienced great difficulty in obtaining necessary financing. As stated in the FCC memorandum:

> In early 1997, the FCC received several requests from C block licensees for relief from their installment payments that described a range of difficulties in accessing the capital markets. . . . The FCC's Wireless Telecommunications Bureau ("Wireless Bureau") also received several proposals from C block licensees regarding alternative financing arrangements, as well as a petition for rulemaking regarding C block installment payments. In response to these requests, the FCC suspended the C block installment payments indefinitely, and initiated an elaborate administrative process for restructuring the C block license obligations.

[3] The C, D, E and F block radio spectrum licenses were allocated in specifically identified geographical areas, referred to as "Basic Trading Areas" ("BTAs"). A significant factor in the value of PCS licenses is the population or number of people served by the license, referred to colloquially as "Pops." Another variable in the value of a license is the carrying capacity of the wireless spectrum covered by the license, expressed in number of megahertz ("MHZ") of radio frequency. The price paid for a license can be quantified in terms of dollars per MHZ per Pops, or $/MHZ-Pops. NextWave bid an average of $1.43/MHZ-Pops for the 63 C block licenses for which it was high bidder. By contrast, the winning bids for the D, E and F block auctions reflected an average value of approximately $.35/MHZ-Pops for D and E block and $.246/MHZ-Pops for F block licenses.

After issuing public notice seeking comments, receiving over 160 filings in response, conducting a public forum in Washington, D.C. and reviewing further submissions thereafter, on October 16, 1997 the FCC issued a "Restructuring Order" which provided distressed C block licensees with four distinct, mutually-exclusive options regarding financial relief for C block licensees. In response to the Restructuring Order, the FCC received numerous petitions for reconsideration, oppositions, replies and *ex parte* filings. On March 24, 1998 the FCC issued a "Reconsideration Order," in which the FCC left intact the basic framework of the Restructuring Order, modifying it only slightly to allow licensees somewhat more flexibility in making their choices available under the Restructuring Order. The Restructuring Order and the Reconsideration Order are referred to collectively as the "Restructuring Orders."

On May 8, 1998 NextWave petitioned the FCC for further reconsideration of the Restructuring Orders, and on May 29, 1998 NextWave filed a petition for review of the Restructuring Orders with the District of Columbia Circuit Court. NextWave asked both the FCC and the Circuit Court for a stay of the June 8, 1998 deadline for its election of one of the four alternatives provided in the Restructuring Orders. Both the FCC and the Circuit Court denied NextWave's requests for stay of the June 8 deadline.

On June 8, 1998 NextWave filed its Chapter 11 petition together with the complaint in this adversary proceeding.

Discussion

The basic legal principles of jurisdiction governing the outcome of this motion are established by statute and are not controversial.

Congress has vested in the Circuit Courts of Appeals exclusive jurisdiction to enjoin, set aside, annul or suspend orders of the FCC. 28 U.S.C. § 2341(1) and 47 U.S.C. § 402. *See FCC v. ITT World Comms., Inc.*, 466 U.S. 463, 468, 104 S. Ct. 1936, 80 L.Ed.2d 480 (1984); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396 (9th Cir. 1996); *Media Access Project v. FCC*, 883 F.2d 1063, 1066 (D.C. Cir. 1989); *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165, 167 (5th Cir. 1989), *cert. denied*, 494 U.S. 1004, 110 S. Ct. 1296, 108 L.Ed.2d 474 (1990). The regulatory jurisdiction conferred by Congress on a Federal agency and the grant of exclusive jurisdiction to the Circuit Courts to review the agency's actions precludes a district court (or, by reference, a bankruptcy court) from enjoining, reviewing, assessing damages for or otherwise adjudicating the consequences of the conduct of the Federal agency acting within the scope of its Congressional mandate. *See, e.g., FCC v. ITT World Comms., Inc.*, 466 U.S. at 468, 104 S. Ct. 1936 ("[l]itigants may not evade these [jurisdictional] provisions by requesting the District Court to enjoin action that is the outcome of the agency's order"); *Dougherty v. Carver Federal Savings Bank*, 112 F.3d 613, 620 (2d Cir. 1997) ("Where Congress has vested exclusive review of an agency action in the court of appeals, a district court cannot enjoin actions that are the

natural outcome of the agency's decision"); *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422, 85 S. Ct. 551, 13 L.Ed.2d 386 (1965); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69, 91 S. Ct. 203, 27 L.Ed.2d 203 (1970); *Pacific Power & Light Co. v. Bonneville Power Admin.*, 795 F.2d 810, 816 (9th Cir. 1986) (barring district court contract action as challenge to administrative rate determination solely reviewable by court of appeals); *Ordower v. Office of Thrift Supervision*, 999 F.2d 1183, 1188 (7th Cir. 1993) (district court did not have jurisdiction over action for breach of fiduciary duty which was, in substance, a challenge to an administrative ruling because the relief sought would "penalize action that the agency has approved or that is the natural outcome of the agency's decision"); *In re Olympia Holding Corp.*, 160 B.R. 185, 190-91 (N.D. Fla. 1993) (bankruptcy court had no jurisdiction over adversary proceeding that challenged Interstate Commerce Commission rule), *aff'd on other grounds*, 88 F.3d 952 (11th Cir. 1996).

Jurisdiction with respect to bankruptcy cases and proceedings is conferred by Congress on the district courts under 28 U.S.C. § 1334, which provides in subsections (a) and (b) as follows:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of

all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Congress has authorized the district courts to refer jurisdiction over bankruptcy cases to the bankruptcy judges for the district, and bankruptcy judges may hear and determine all "core proceedings" arising under Title 11, including proceedings relating to fraudulent conveyances. Section 157 provides in pertinent part as follows in subsections (a) and (b):

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
>
> (2) Core proceedings include, but are not limited to—
>
> > (A) matters concerning the administration of the estate;
> >
> > * * * * * *
> >
> > (H) proceedings to determine, avoid, or recover fraudulent conveyances;

These statutory provisions confer upon the district and bankruptcy courts exclusive jurisdiction to admin-

ister the Bankruptcy Code and Rules and to resolve claims, adversary proceedings and contested matters arising under the Code. The role of the bankruptcy court is to adjudicate and adjust the rights of creditors and debtors in accordance with the Code. Nothing in section 309(j) of the FCA or any other statute confers any regulatory or other jurisdiction upon the FCC to make rules or other determinations with respect to its own status *as a creditor* vis-a-vis its debtors or other creditors of its debtors. No such jurisdiction is claimed by the FCC. By the same token, the Bankruptcy Code expressly recognizes the exclusive jurisdiction of regulatory agencies to perform the regulatory functions conferred upon them by statute. Thus, section 362 of the Bankruptcy Code governing the automatic stay, one of the centerpieces of the Code, provides an exception to the automatic stay in subsection (b)(4) for "an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." However, as recognized by the FCC (Memorandum at ftn.5 p. 18), the FCC *in its capacity as a creditor* is subject to the Bankruptcy Code including the automatic stay. *See NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992); *Matter of Fugazy Exp., Inc.*, 114 B.R. 865 (Bankr. S.D.N.Y. 1990), *aff'd*, 124 B.R. 426 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2nd Cir. 1992), *motion to vacate denied*, 159 B.R. 432 (Bankr. S.D.N.Y. 1993), *leave to appeal denied*, 163 B.R. 434 (S.D.N.Y. 1994).

The task on this motion is to determine whether the claims asserted against the FCC by NextWave affect NextWave in its capacity as a creditor, or require this Court to examine, pass judgment upon and attach legal consequences to the conduct of the FCC acting within

the regulatory jurisdiction conferred upon it by Congress.

The first cause of action

The first cause of action entitled "Fraudulent Conveyance of C Block Licenses to NPCI," paragraphs 63-70 of the First Amended Complaint, does not allege any regulatory conduct on the part of the FCC. It simply asserts that the "transfers" alleged in paragraphs 63-70, comprising the $475 million of deposits and the $4.26 billion of Notes executed by NextWave and transferred to the FCC, exceeded the value of the property received by NextWave from the FCC in exchange, namely, the 63 C block licenses, which are alleged to have had a value of less than $1 billion on February 19, 1997 when the Notes were executed by NextWave. The first cause of action seeks the equitable remedies of avoidance for the benefit of other creditors and the debtor available under 11 U.S.C. § 544. The claim asserted in the first cause of action is constructive fraudulent conveyance and implicates no conduct of the FCC. Whatever may be the merits of the first cause of action as a matter of bankruptcy law, this Court will not be called upon to adjudicate or attach any consequence to any act or omission of the FCC in its regulatory capacity. Congress has not vested in the FCC any regulatory power with respect to its status as a creditor or its rights to share with other creditors in the limited assets of its debtors. Nor has Congress deprived the district court or the bankruptcy court of jurisdiction under 28 U.S.C. §§ 1334(a) and 157(a) and (b) to hear and determine matters arising under Title 11, including 11 U.S.C. § 544.

The FCC argues that when Congress authorized it to allocate blocks of radio spectrum by competitive bidding "it was emphatic that the organization, execution and implementation of such auctions fell squarely within the agency's regulatory power" (FCC Memo p. 11). That is unquestionably so, but the first cause of action does not seek to litigate any issue with respect to the organization, execution or implementation of the radio spectrum auctions.

Quoting from Commission Susan Ness, the FCC argues that "the Commission's fundamental role is that of a licensing agency, not that of a lender . . . Those who say the [FCC] functioned as a banker are mistaken. . . . We never assumed the responsibility of creating 'commercially reasonable alternatives' for whatever difficulties the C block licenses [sic] encountered" (FCC Memo pp. 14-15). Commissioner Ness is, of course, correct in acknowledging that Congress never conferred upon the FCC "the responsibility of creating 'commercially reasonable alternatives' for whatever difficulties the C block licenses [sic] encountered"—indeed, Congress has provided in the Bankruptcy Code for the adjustment of creditors' rights and the fair allocation among creditors of the limited assets of a debtor. But Commissioner Ness is obviously incorrect in asserting, if that was her intent, that the FCC is not a creditor. There can be no dispute that the FCC is a creditor, and nothing in section 309(j) or elsewhere in the FCA or in the Bankruptcy Code states that the FCC is exempt from any of the provisions of the Code which affect it *as a creditor.*

At oral argument counsel for the FCC stated that the FCC's motion with respect to the first cause of action is

dependent on the Restructuring Orders. In essence, the position is that the Restructuring Orders constituted final administrative determinations establishing the four mutually-exclusive alternatives for NextWave to readjust its $4.26 billion indebtedness to the FCC and, as final Orders, they may be reviewed only by the Circuit Court; any relief granted by the Bankruptcy Court under 11 U.S.C. § 544 would necessarily conflict with the Restructuring Orders and thereby invade the purported jurisdiction of the FCC and the Circuit Court. It is argued that the adoption of the Restructuring Orders constituted an "intervening action" of the FCC which divested the Bankruptcy Court of jurisdiction which it might have had to administer those provisions of the Bankruptcy Code which would otherwise have applied to the FCC as a creditor.

The basic defect in the FCC's argument is that Congress did not confer upon the FCC the power to determine unilaterally its own rights as a creditor in competition with and to the detriment of other creditors. A fundamental objective of the Bankruptcy Code is to insure fairness and equality of treatment among creditors whose claims may vastly exceed the assets of the debtor, as in this case. Thus, the objective of fraudulent conveyance provisions is to insure that other creditors are not unfairly disadvantaged by the claim of a single creditor who, in a fraudulent or constructively fraudulent transaction, conveyed property to a debtor worth substantially less in value than the amount of its claim. Aside from fairness to other creditors, fraudulent conveyance and other provisions of the Bankruptcy Code are designed in part to facilitate the capacity of a debtor to reorganize and thereby repay its debts as they may be restructured in a

confirmable plan. Nothing in Section 309(j) or elsewhere in the FCA even suggests that Congress intended to empower the FCC to promulgate orders which have nothing to do with its regulatory functions and which are designed solely to enhance the FCC's position as a creditor to the detriment of rights provided under the Bankruptcy Code for the benefit of other creditors and the debtor.

That is not to say that the FCC did not have the right to promulgate the Restructuring Orders, as expressing the alternatives to which the FCC would voluntarily agree for the relief of C block licensees. Any party, whether government agency or private person, may formulate alternatives which it, as a creditor, would be willing to accept for the relief of its debtors. But in the absence of a clear expression by Congress, neither a Federal agency nor a private person has the power to dictate its own rights as a creditor and thereby confound the rights of other creditors and the debtor established by Congress under the bankruptcy laws. The FCA does not grant the FCC any such power and, as shown in NextWave's submissions, Congress declined to pass a bill propounded by the FCC which would have expressly voided the Bankruptcy Court's jurisdiction in cases such as this.

Little need be said of the FCC's argument that the FCA preempts a state fraudulent conveyance claim. First, the FCC does not and cannot take the position that the FCA preempts Section 544 of the Bankruptcy Code. Second, a state law claim may only be preempted by federal law under three circumstances: (i) where Congress defines explicitly the extent to which its enactments preempt state law or, in the absence of such

explicit statutory language, (ii) where state law "regulate[s] conduct in a field that Congress intended the Federal Government to occupy exclusively" or (iii) where state law "actually conflicts with federal law." *English* v. *General Electric Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L.Ed.2d 65 (1990). None of these circumstances exist in this case. Nothing in the FCA conflicts with a fraudulent conveyance claim or manifests an intent to legislate with respect to debtor-creditor relations or to authorize the FCC to dictate for itself a preferred creditor status at variance with state or Federal debtor-creditor laws or the Bankruptcy Code.

The second cause of action

The second cause of action of the First Amended Complaint is based exclusively on alleged misconduct of the FCC acting in its regulatory capacity. Thus, paragraph 92 alleges:

> 92. The FCC completely controlled all aspects of the C block auction process, including the rules, timing and manner in which the C block licenses were issued to NPCI. The C block licenses constitute all or substantially all of NPCI's assets. The FCC thus controlled NPCI's business and all of its assets.

Virtually every one of paragraphs 92 through 115, comprising the operative allegations of the second cause of action, allege conduct of the FCC in its regulatory capacity conferred under section 309(j), including such matters as the failure to inform NextWave that the FCC would commence and conclude bidding on the D, E and F blocks before NextWave received its license

determination made pursuant to . . . the [FAA] Act"); *City of Rochester v. Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979) ("Congress [did not intend] the exclusivity vel non of statutory review to depend on the substantive infirmity alleged"). Subject matter jurisdiction depends on whether the claim asserted arises from conduct of the agency which relates to "the substantive core of an agency's mandate." *City of Rochester*, 603 F.2d at 937.

It follows from the foregoing that this Court does not have subject matter jurisdiction to adjudicate the propriety of the FCC's regulatory conduct complained of in the second cause of action.

* * * * * *

Counsel for NextWave and the FCC are directed to confer together and jointly prepare an order, agreed as to form, consistent with this decision, without prejudice to the right of either party to appeal.

CONDITIONS:

Pursuant to Section 309(h) of the Communications Act of 1934, as amended, (47 U.S.C. § 309(h)), this license is subject to the following conditions: This license does not vest in the licensee any right to operate a station nor any right in the use of frequencies beyond the term thereof nor in any other manner than authorized herein. Neither this license nor the right granted thereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934, as amended (47 U.S.C. § 151, et seq.). This license is subject in terms to the right of use or control conferred by Section 706 of the Communications Act of 1934, as amended (47 U.S.C. § 606).

WAIVERS:

No waivers associated with this authorization.

CONDITIONS:

This authorization is subject to the condition that, in the event that systems using the same frequencies as granted herein are authorized in an adjacent foreign territory (Canada/United States), future coordination of any base station transmitters within 72 km (45 miles) of the United States/Canada border shall be required to eliminate any harmful interference to operations in the adjacent foreign territory and to ensure continuance of equal access to the frequencies by both countries.

This authorization is conditioned upon the full and timely payment of all monies due pursuant to Sections 1.2110 and 24.711 of the Commission's Rules and the terms of the Commission's installment plan as set forth in the Note and Security Agreement executed by the licensee. Failure to comply with this condition will result in the automatic cancellation of this authorization.

Issued Date: January 3, 1997
FCC Form 463a

$14,539,220.72, due on the last day of the month and every ninety (90) days thereafter after April 30, 1997 through and including January 31, 2003.

Commencing with the payment due on April 30, 2003, Maker shall pay principal and interest in equal quarterly installments of **$63,954,958.51**, due on the last day of each month ninety (90) days hence through and including October 31, 2006.

The entire unpaid Principal Amount, together with accrued and unpaid interest thereon, and all remaining obligations of Maker hereunder, shall be due and payable on January 3, 2007 ("**Maturity Date**").

All interest shall be computed on the basis of a 360-day year for actual days elapsed.

All payments to be made hereunder, of principal, interest, costs, expenses, or other sums due hereunder, shall be made to the holder of this Note in lawful money of the United States of America which at the time of payment shall be legal tender for the payment of public and private debts, free and clear and without reduction by reason of any present or future income, stamp or other taxes, levies, imposts, deductions, charges, compulsory loans or withholdings whatsoever, including interest thereon or penalties with respect thereto, if any imposed, assessed, levied or collected by any political subdivision or taxing authority thereof or therein, on or in respect of this Note or the obligations it evidences. All payments shall be made during normal business hours at the Commission's designated lockbox location as set forth from time to time in the Commission's then-applicable orders and regulations and/or public notices.

the grant of such grace period or extension or upon denial of such a request for a grace period or extension, Maker has not resumed payments of Interest and Principal in accordance with the terms of this Note:

or;

b. failure by Maker to comply with any other condition for holding the above referenced License (as defined in the Security Agreement) as set forth in the License or in the Communications Act of 1934, as amended, or the then-applicable orders and regulations of the Commission; or

c. violation by Maker of any other covenant or term of this Note or the Security Agreement.

Upon any Event of Default under this Note, Payee may assess a late fee and/or administrative charge, plus the costs of collection, litigation, attorneys' fees, and default payment as specified in the then-applicable orders and regulations of the Commission, as amended, and Maker acknowledges that it is liable and herein expressly promises to pay on demand such additional costs, expenses, late charges, administrative charges, attorneys fees, and default payment. Upon a default under this Note, the unpaid Principal Amount, plus all unpaid interest accrued thereon, together with any late fee and/or administrative charge, plus the costs of collection, litigation, attorneys' fees, and default payment as specified in the then-applicable orders and regulations of the Commission, as amended, shall become immediately due and payable. The Maker hereby acknowledges that the Commission has issued Maker the above referenced License pursuant to the Communications

Act of 1934, as amended, that is conditioned upon full and timely payment of financial obligations under the Commission's installment payment plan, as set forth in the then-applicable orders and regulations of the Commission, as amended, and that the sanctions and enforcement authority of the Commission shall remain applicable in the event of a failure to comply with the terms and conditions of the License, regardless of the enforceability of this Note or the Security Agreement.

No delay or omission on the part of Payee in exercising any right under this Note, the Security Agreement, or any other instrument securing this Note, shall operate as a waiver of such right or of any other right of Payee, nor shall any waiver by Payee of any such right or rights on any one occasion be deemed a bar to or waiver of the same right or rights on any future occasion.

Maker is liable for all costs of collection or enforcement of the Payee's rights under this Note or under the Security Agreement or under any other instrument now or hereafter executed by Maker in favor of Payee which in any manner evidences or constitutes additional security for this Note, including reasonable attorneys' fees, whether suit is brought or not, and all such costs shall be paid by the Maker on demand, and whether or not such collection or enforcement occurs in any bankruptcy, reorganization, receivership or other proceedings involving creditors' rights or involving a claim under this Note or any of the other loan documents.

Maker, all endorsers and guarantors hereof and any other party who may become liable for all or any part of the obligation evidenced hereby, waive presentment for payment, notice or dishonor, protest and notice of

protest, notice of nonpayment and any and all lack of diligence or delays in collection or enforcement of this Note.

Maker may prepay all or any part of the Principal Amount without premium or penalty upon ten (10) days' prior written notice to Payee, given in the manner provided in the Security Agreement.

Partial prepayments shall not postpone or reduce regular payments to be made hereunder. All such prepayments shall be applicable first to the payment of late charges, if any, costs and expenses, and administrative penalties due hereunder, then to accrued and unpaid interest, then to that portion of the unpaid Principal Amount due on the Maturity Date and then, if applicable, to any unpaid installments of principal in the inverse order of installment maturities. The Payee may require that any partial prepayments be made on the dates installments of principal and interest are due hereunder.

Anything to the contrary notwithstanding, Payee shall not charge, take or receive, and Maker shall not be obligated to pay to Payee, any amounts constituting interest on the Principal Amount in excess of the maximum rate permitted by applicable law. If by reason of the acceleration of the unpaid Principal Amount or otherwise, interest in excess of the highest legal contract rate permitted by applicable law shall at any time be paid, any such excess shall constitute and be treated as a payment of outstanding principal hereunder and shall operate to reduce such outstanding Principal Amount.

ANY LEGAL ACTION OR PROCEEDING RELATING TO THIS NOTE, THE SECURITY AGREEMENT, OR OTHER DOCUMENTS EVIDENCING OR SECURING THE DEBT TRANSACTION EVIDENCED HEREBY MAY ONLY BE BROUGHT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, AND, BY EXECUTION AND DELIVERY OF THIS NOTE AND SECURITY AGREEMENT, THE MAKER HEREBY ACCEPTS FOR ITSELF AND IN RESPECT OF ITS PROPERTY GENERALLY AND UNCONDITIONALLY, THE JURISDICTION OF THE AFORESAID COURT. THE PARTIES HERETO HEREBY IRREVOCABLY WAIVE ANY OBJECTION, INCLUDING, WITHOUT LIMITATION, ANY OBJECTION TO THE LAYING OF VENUE OR BASED ON THE GROUNDS OF *FORUM NON CONVENIENS*, WHICH ANY OF THEM MAY NOW OR HEREAFTER HAVE TO THE BRINGING OF ANY SUCH ACTION OR PROCEEDING IN THE DISTRICT OF COLUMBIA.

THE MAKER IRREVOCABLY CONSENTS TO THE SERVICE OF PROCESS OF THE AFOREMENTIONED COURT IN ANY SUCH ACTION OR PROCEEDING BY THE MAILING OF A COPY THEREOF BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, POSTAGE PREPAID, TO THE MAKER AT ITS ADDRESS PROVIDED HEREIN. SUCH SERVICE SHALL BE DEEMED TO HAVE OCCURRED ON THE THIRD DAY AFTER SUCH MAILING. NOTHING CONTAINED HEREIN SHALL AFFECT THE RIGHT OF PAYEE TO SERVE PROCESS IN ANY OTHER MANNER PERMITTED BY LAW OR COMMENCE LEGAL PROCEEDINGS OR OTHERWISE PROCEED AGAINST THE MAKER IN ANY OTHER JURISDICTION.

Maker acknowledges that this Note and Security Agreement (any attachments affixed thereto by the Commission with the permission and knowledge of the Maker/Debtor), along with the then-applicable Commission orders and regulations and the Communications Act of 1934, as amended, set forth the entire agreement, written and oral, of the parties, and all inconsistent prior statements, understandings, notices, representations and agreements between the parties, oral or written, are superseded by and merged in this Note, the Security Agreement or other documents evidencing or securing the debt transaction evidenced hereby. Except as otherwise expressly provided herein, all of Payee's representations, warranties, covenants and agreements in this Note and Security Agreement shall merge in the documents and agreements executed by the Maker and shall not survive said execution.

If any provision or part of this Note and/or the Security Agreement shall for any reason be held or deemed to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforecability shall not affect any other provision of this Note and this Note shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein and the remaining provisions of this Note shall remain in full force and effect. The enforceability of the Note and/or the Security Agreement do not alter the rights and obligations of the Maker and Payee under the Communications Act of 1934, as amended, or under the then-applicable orders and regulations of the Commission, as amended.

Any notice demand or request hereunder shall be given in the manner set forth in the Security Agreement.

This Note shall be governed by and construed in accordance with the Communications Act of 1934, as amended, the then-applicable orders and regulations of the Commission, and federal law. Nothing in this Note shall be deemed to modify any then-applicable orders and regulations of the Commission, and nothing in this Note shall be deemed to release the Maker from compliance therewith. This Note may not be changed, modified, waived, terminated or discharged orally, but only by an agreement in writing executed by the party against whom enforcement of any such change, modification, waiver, termination, or discharge is sought.

Maker represents and warrants that any statements made by or on behalf of Maker in connection with this Note: (I) are true and accurate in all material respects; and (ii) do not omit any material facts or information that would make such statement misleading in the context of Payee's evaluation of the note, and acknowledges and agrees that Payee is entitled to and his relied on such statements in agreeing to the Note.

Payee shall have the right at any time to assign, endorse, pledge, convey or otherwise transfer this Note and all of the other loan documents to any party. From and after the date of such assignment, endorsement, pledge, conveyance or other transfer, such transferee shall be entitled to exercise any and all rights and remedies of Payee hereunder. Maker shall not assign, convey or otherwise transfer its rights and obligations hereunder without the prior written consent of the Commission.

License Number: PBB321C

INSTALLMENT PLAN C AMORTIZATION SCHEDULE

for Federal Communications Commission Broadband Personal Communications Service, C-Block Licenses

(Interest-only Payments for the First Six Years)

Orig Balance	Orig Rate	Term (yrs)	1st PMT	Future Value
$894,721,275.00	6.50%	10	Apr-97	$0

Pmt #	Date	Yr Rate	P&I Payment	Principal	Interest	Extra Prin	New Balance (Prin Only)	Cum. Interest	Yearly Total Int
1	Apr-97	6.50%	$19,082,533.83	$0.00	$19,082,533.83	$0.00	$894,721,275.00	$19,082,533.83	$19,082,533.83
2	Jul-97	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$33,601,754.55	$14,539,220.72
3	Oct-97	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$48,140,975.27	$29,078,441.44
4	Jan-98	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$62,680,195.99	$43,617,662.16
5	Apr-98	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$77,219,416.71	$58,156,882.88
6	Jul-98	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$91,758,637.43	$14,539,220.72
7	Oct-98	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$106,297,858.14	$29,078,441.44
8	Jan-99	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$120,837,078.86	$43,617,662.16
9	Apr-99	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$135,376,299.58	$58,156,882.88
10	Jul-99	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$149,915,520.30	$14,539,220.72
11	Oct-99	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$164,454,741.02	$29,078,441.44
12	Jan-2000	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$178,993,961.74	$43,617,662.16
13	Apr-2000	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$193,533,182.46	$58,156,882.88
14	Jul-2000	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$208,072,403.18	$14,539,220.72
15	Oct-2000	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$222,611,623.89	$29,078,441.44
16	Jan-2001	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$237,150,844.61	$43,617,662.16
17	Apr-2001	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$251,690,065.33	$58,156,882.88
18	Jul-2001	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$266,229,286.05	$14,539,220.72
19	Oct-2001	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$280,768,506.77	$29,078,441.44
20	Jan-2002	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$295,307,727.49	$43,617,662.16
21	Apr-2002	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$309,846,948.21	$58,156,882.88
22	Jul-2002	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$324,386,168.93	$14,539,220.72
23	Oct-2002	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$338,925,389.64	$29,078,441.44
24	Jan-2003	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$353,464,610.36	$43,617,662.16
25	Apr-2003	6.50%	$63,954,958.51	$49,415,737.79	$14,539,220.72	$0.00	$845,305,537.21	$368,003,831.08	$58,156,882.88
26	Jul-2003	6.50%	$63,954,958.51	$50,218,743.53	$13,736,214.98	$0.00	$795,086,793.68	$381,740,046.06	$13,736,214.98
27	Oct-2003	6.50%	$63,954,958.51	$51,034,788.11	$12,920,160.40	$0.00	$744,051,995.57	$394,660,206.46	$26,656,375.38
28	Jan-2004	6.50%	$63,954,958.51	$51,864,113.58	$12,090,844.93	$0.00	$692,187,881.99	$406,751,051.39	$38,747,220.31
29	Apr-2004	6.50%	$63,954,958.51	$52,708,905.43	$11,246,053.08	$0.00	$639,480,976.56	$417,998,104.47	$49,995,273.39
30	Jul-2004	6.50%	$63,954,958.51	$53,583,392.64	$10,391,565.87	$0.00	$585,917,583.92	$428,389,670.34	$10,391,565.87
31	Oct-2004	6.50%	$63,954,958.51	$54,433,797.77	$9,521,160.74	$0.00	$531,483,786.15	$437,911,831.08	$19,912,726.61
32	Jan-2005	6.50%	$63,954,958.51	$55,318,346.99	$8,636,611.52	$0.00	$476,165,439.16	$446,548,442.60	$28,549,338.13
33	Apr-2005	6.50%	$63,954,958.51	$56,217,270.12	$7,737,688.39	$0.00	$419,948,169.04	$454,286,130.99	$36,287,026.52
34	Jul-2005	6.50%	$63,954,958.51	$57,130,800.76	$6,824,157.75	$0.00	$362,817,368.28	$461,110,288.74	$6,824,157.75
35	Oct-2005	6.50%	$63,954,958.51	$58,058,176.28	$5,895,782.23	$0.00	$304,758,192.00	$467,006,070.97	$12,719,939.98
36	Jan-2006	6.50%	$63,954,958.51	$59,002,637.89	$4,952,320.62	$0.00	$245,755,554.11	$471,958,391.59	$17,672,260.60
37	Apr-2006	6.50%	$63,954,958.51	$59,961,430.76	$3,993,527.75	$0.00	$185,794,123.35	$475,951,919.34	$3,993,527.75
38	Jul-2006	6.50%	$63,954,958.51	$60,935,804.01	$3,019,154.50	$0.00	$124,858,319.34	$478,971,073.84	$7,012,682.25
39	Oct-2006	6.50%	$63,954,958.51	$61,926,010.82	$2,028,947.69	$0.00	$62,932,308.52	$481,000,021.53	$9,041,629.94
40	Jan-2007	6.50%	$63,648,183.53	$62,932,308.52	$715,855.01	$0.00	$0.00	$481,715,876.54	$715,855.01

License Grant date January 3, 1997
First and last payments prorated based on the above license grant date

BEST AVAILABLE COPY

APPENDIX O

SECURITY AGREEMENT

(Broadband Personal Communications Service,
C Block: Auction Event No. 5, 10)

License No. PBB321C

This SECURITY AGREEMENT DATED January 3, 1997, ("**Agreement**") between NEXTWAVE PERSONAL COMMUNICATIONS, INC., a Delaware corporation ("**Debtor**"), and the FEDERAL COMMUNICATIONS COMMISSION, an independent regulatory agency of the United States ("**Commission**" or "**Secured Party**")

WITNESSETH

WHEREAS, Debtor has submitted the highest accepted bid for license number PBB321C in the Broadband Personal Communications Service C Block auction (hereinafter the "**License**") conducted by the Commission to assign such licenses;

WHEREAS, the Commission has duly determined to grant the License to Debtor, subject to the terms and conditions set forth in the orders and regulations of the Commission applicable to such licenses, and the Communications Act of 1934, as amended;

WHEREAS, Debtor wishes to pay its auction price for the License by installments through an Installment Payment Plan as provided by 47 C.F.R. §§ 24.711, 1.2110 (hereinafter the "**Installment Payment Plan**") and undertakes to hold the License under the terms

and conditions set forth in the Commission's orders and regulations, as amended, applicable to such licenses, and the Communications Act of 1934, as amended and the terms and conditions of this Agreement;

WHEREAS, the Commission has agreed to permit the Debtor to make payment of the auction price for the License through an Installment Payment Plan; and

WHEREAS, as a condition to such agreement, Debtor has agreed to execute the Installment Payment Plan Note of even date ("**Note**") and to enter into this Agreement and make the pledge and assignment of collateral contemplated herein.

NOW, THEREFORE, in consideration of the premises, the mutual agreements contained herein and for other good and valuable consideration, the receipt, adequacy, and sufficiency of which is hereby acknowledged, and in order to induce the Commission to permit Debtor to pay the auction price for the License through the Installment Payment Plan, Debtor hereby agrees with the Commission as follows:

1. Pledge and Assignment of Collateral for Obligations Under Note. Debtor hereby pledges, assigns, hypothecates, delivers, and sets over to the Commission and grants to the Commission a fist lien on and continuing security interest in all of the Debtor's rights and interest in the License and all proceeds, profits and products of any sale of or other disposition thereof (collectively the "**Collateral**"), all as collateral security for the prompt and complete payment when due (whether in accordance with the schedule of payments, at the stated maturity, by acceleration, or otherwise) of the unpaid principal and interest due, and such other

additional costs, expenses, late charges, administrative charges, attorneys fees, and default payments assessable under the terms of the Note (all collectively "**Obligations**"). It is expressly understood by Debtor that all of the terms of the Note apply to this Agreement and that reference herein to "this Agreement" includes both the Security Agreement herein and the Note. For purposes of interpreting the terms used in this Agreement shall have the meaning ascribed to them in the Uniform Commercial Code (Official Text and Comments, American Law Institute).

2. Interest of Commission. It is understood and acknowledged by Debtor that pursuant to Section 301 of the Communications Act of 1934, as amended, the Commission is charged with the regulatory mandate to maintain control over all channels of radio transmission (the "Spectrum"), and to provide licenses for the use of such radio channels, but not ownership thereof. Debtor understands and acknowledges that it holds a mere conditional license to use the Spectrum with no ownership interest in the Collateral (or any underlying right to use the Spectrum), or any power to assign the License without the prior approval of the Commission pursuant to Section 310(d) of the Communications Act of 1934, as amended. Debtor further understands and acknowledges that it is giving a security interest to the Commission in the Collateral only to assist the Commission in protecting its ability to enforce the Commission's regulations which condition holding the license in compliance with all then-applicable orders and regulations of the Commission, including, but not limited to, full and timely payment of all payments under the Installment Payment Plan. To that end, and not in derogation of any of the Commission's regulatory

authority over the License, Debtor hereby acknowledges that the Commission has a first security interest in the Collateral, and Debtor shall not dispute such first security interest, or the Commission's rights as a secured party hereunder, in any legal or equitable proceeding in which Debtor, or any assignee or trustee of the estate of Debtor in bankruptcy, is a party. Nothing set forth herein shall preclude the Debtor from granting to other parties a subordinated security interest limited to a subordinated interest in the proceeds arising from an authorized assignment or transfer of the License to a third party (hereinafter a "Subordinated Security Interest"), provided however that any such Subordinated Security Interest shall be subordinated to and in no way inconsistent with the Commission's first security interest in the Collateral, including but not limited to the proceeds of any disposition of the License, and further provided that said Subordinated Security Interest shall not survive if the License is rescinded, cancelled, or revoked by regulatory action of the Commission for violation of the terms and conditions of the License, including but not limited to regulatory action upon a default under this Agreement pursuant to 47 C.F.R. § 1.2110. The Debtor shall provide to the Commission upon request the name and address of any party with a Subordinated Security Interest in the proceeds of any disposition of the License, and a copy of any documents setting forth such a Subordinated Security Interest.

3. Compliance with Commission Orders and Regulations. Nothing in this Agreement shall be deemed to modify any then-applicable orders and regulations of the Commission, and nothing in this Agreement shall be deemed to release Debtor from compliance therewith.

4. Representations and Warranties of Debtor. Debtor represents and warrants to the Commission as follows:

(a) It has full power, authority and legal right to execute, deliver and perform this Agreement, the Note, and any other documents delivered in connection with the Note, this Agreement and the transactions contemplated therein, to make the debt transaction evidenced by the Note, and to pledge the Collateral pursuant to this Agreement.

(b) It is a duly organized corporation, existing in good standing under the laws of Delaware and is duly qualified to do business wherever necessary to carry on its present operations. Its principal place of business and chief executive office are located at San Diego, CA, 92122.

(c) The representative of Debtor purporting to act on behalf of Debtor in executing this Agreement, the Note, and any other documents delivered in connection with the Note, this Agreement and the transactions contemplated therein, is duly authorized by Debtor to take all such acts and to execute all such documents.

(d) No security agreements have been executed and delivered, and no financing statements have been filed in any jurisdiction, granting or purporting to grant a security interest in the Collateral that would give any other person any right or interest in the Collateral, or any portion thereof, except for a Subordinated Security Interest, as defined herein, and that no person has a secured interest that is or will be in any way inconsistent with the rights of the

Commission herein as the first secured party or the terms of this Agreement.

(e) No consent of any other party and no consent, license, approval or authorization of, exemption by, or registration or declaration with, any governmental instrumentality, domestic or foreign other than the Commission, is required to be obtained in connection with the execution, delivery or performance of this Agreement, the Note or any other document executed and delivered in connection with the delivery of the Note or this Agreement.

(f) The execution, delivery and performance of this Agreement and the Note does not and will not violate any provision of any applicable law or regulation or any order, judgment, writ, award or decree of any court, arbitrator, governmental instrumentality, domestic or foreign, or of any indenture, contract, agreement or other undertaking to which Debtor is a party or which purports to be binding upon Debtor or upon any of Debtor's assets, and will not result in the creation or imposition of any lien, charge or encumbrance on or security interest in any of the assets of Debtor, except as contemplated by this Agreement.

(g) Debtor will not permit any financing statement to be filed with respect to the Collateral or any portion thereof or interest therein that would give said any other person a right or any interest in the Collateral, or any portion thereof, except that Debtor may permit a third party to file a Subordinated Security Interest, as defined herein, so long as said Subordinated Security Interest, is

not in any way inconsistent with the terms of this Agreement and the rights of the Commission herein as the first secured party. Debtor will promptly notify Secured Party of, and will defend the Collateral against, all claims and demands of all persons at any time claiming the same or any interest therein that would give any other person a right or any interest in the Collateral not subordinated to the rights of the Commission herein as the first secured party, or that is in any way inconsistent with the terms of this Agreement.

5. Covenants of Debtor. Debtor hereby covenants and agrees as follows:

(a) That it will defend the Commission's right, title and security interest in and to the Collateral against the claims and demands of all persons whomsoever.

(b) That it will execute all financing statements and other instruments or documents related to the perfection of the Commission's security interest, including but not limited to any renewal financing statements or instruments as required to maintain the Commission's security interest, or as otherwise reasonably requested by the Commission, and to file and pay the cost of filing any such instruments or documents as required under this paragraph in whichever public office deemed advisable by the Commission.

(c) That it will not make any indenture, contract, agreement or other undertaking to which Debtor is a party or which purports to be binding upon Debtor, or upon any of Debtor's assets, that would

result in the creation or imposition of any lien, charge or encumbrance on or security interest in any of the assets Debtor that would give any other person a right or any interest in the Collateral, or any portion thereof, except for a Subordinated Security Interest, as defined herein, provided that such Subordinated Security Agreement is not inconsistent with the terms of this Agreement and interest of the Commission as the first secured party.

(d) That it will pay all costs and expenses, including reasonable attorneys' fees, of the Commission incurred in connection with the enforcement of this Agreement and any and all liability incurred by the Commission resulting from any act or omission of Debtor with respect to the Collateral and this Agreement.

(e) Debtor will execute, alone or with Secured Party, any document, will procure any document and do all other acts and pay all connected costs, in a timely and proper manner, which from the character or use of the Collateral may be reasonably necessary to protect the Collateral against the rights, claims or interests of third persons, and will otherwise preserve the Collateral as security hereunder. The specific undertakings required of Debtor in this Agreement shall not be construed to exclude the aforementioned general obligation.

6. Power of Attorney. Debtor hereby irrevocably constitutes and appoints the Commission and any officer or agent thereof, with full power of substitution, as its true and lawful attorney-in-fact will irrevocable power and authority in the place and stead of Debtor

and in the name of Debtor or in its own name, from time to time in the Commission's discretion, for the purpose of carrying out the terms of this Agreement and, to the extent permitted by applicable law, to take any and all appropriate actions and to execute any and all documents and instruments which may be necessary or desirable to accomplish the purposes of this Agreement. Such appointment is a power coupled with an interest until all Obligations have been paid in full by Debtor.

7. Event of Default. Debtor shall be in default under this Agreement if an Event of Default (as defined in the Note) has occurred.

8. Remedies. If an Event of Default shall occur, the Commission shall thereafter have the following rights and remedies (to the extent permitted by applicable law) in addition to the rights and remedies relating to the Note, all such remedies being cumulative, not exclusive, and enforceable alternatively, successively or concurrently at such time or times as Commission deems expedient:

(a) the License shall be automatically canceled pursuant to 47 C.F.R. § 1.2110;

(b) all Obligations secured hereunder shall become immediately due and payable without presentment, demand, protest, further notice, or other requirements of any kind;

(c) the Commission may demand, sue for, and collect the outstanding balance of the unpaid Obligations, and make any compromise, or settlement the Commission deems suitable with respect to any Collateral which may be held by it hereunder;

(d) Debtor hereby acknowledges the Commission's authority, pursuant to the Communications Act of 1934, as amended, and the Commission's orders and regulations then-applicable to such licenses, to conduct another public auction or assign the License in the event that the Commission rescinds, cancels, or revokes the License for any default under this Agreement or any other violation of the terms and conditions of the License. The Undersigned hereby waives all notices prior to the conduct of said public auction or assignment by the Commission or its agents. Debtor further acknowledges that in the event that the Commission rescinds, cancels, or revokes the License for any default under this Agreement or any other violation of the terms and conditions of the License, Debtor has no right or interest in any moneys or evidence of indebtedness given to the Commission by a subsequent licensee of the Spectrum and that all such moneys or evidence of indebtedness are, and shall remain, the full property of the federal Treasury, pursuant to Section 309(j) of the Communications Act of 1934, as amended, and then-applicable Commission orders and regulations.

(e) In addition to other remedies hereunder, Debtor shall remain liable, and obligated to pay on demand, all costs of collection and reasonable attorneys' fees and expenses incurred or paid by the Commission in enforcing this Agreement including, without limitation, all administrative fees and expenses of the Commission in attempting to collect the Obligations or to enforce this Agreement, or the prosecution or defense of any action or proceeding related to the subject matter of this Agreement, and

all payments assessed by the Commission in the event of default as specified in Commission orders and regulations applicable to such licenses.

(f) Debtor hereby acknowledges that the Commission has no adequate remedy at law with respect to a breach of any covenant contained in this Agreement and, as a consequence, agrees that each and every covenant contained in this Agreement shall be specifically enforceable against Debtor, and Debtor hereby waives and agrees not to assert any defense against an action for specific performance of such covenants.

(g) Secured Party may exercise any and all of the rights and remedies conferred upon Secured Party by this Agreement, any other loan documents, or by applicable law, either concurrently or in such order as Secured Party may determine.

(h) Secured Party may make such payments and do such acts as Secured Party may deem necessary to protect its security interest in the Collateral.

(i) the Commission may exercise any remedies of a Secured Party under the Uniform Commercial Code (Official Text and Comments, American Law Institute), or any other applicable law.

(j) Secured Party shall have the right to enforce one or more remedies hereunder or under the Note, successively or concurrently, and such action shall not operate to estop or prevent Secured Party from pursuing any further remedy which it may have.

9. Severability. Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

10. No Waiver; Cumulative Remedies. None of the terms or provisions of this Agreement may be waived, altered, modified or amended except by an instrument in writing, duly executed by the Commission. The Commission shall not by any act, delay, omission or otherwise be deemed to have waived any of its rights or remedies under this Agreement, and no waiver shall be valid unless in writing, signed by the Commission, and then only to the extent therein set forth. A waiver by the Commission of any right or remedy under this Agreement on any one occasion shall not be construed as a bar to any right or remedy which the Commission would otherwise have on any future occasion. No failure to exercise nor any delay in exercising on the part of the Commission, any right, power or privilege under this Agreement shall operate as a waiver thereof; nor shall any single or partial exercise of any right, power or privilege under this Agreement preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies provided in this Agreement are cumulative and may be exercised singly or concurrently and are not exclusive of any rights or remedies provided by law.

11. Compliance With Other Applicable Orders and Regulations. Debtor recognizes that its continued retention of the License, and rights to operate as a Commission licensee thereunder, are conditioned upon compliance with all Commission orders and regulations applicable to the License and the Communications Act of 1934, as amended. Debtor further recognizes that full and timely payment as set forth in the Note does not otherwise relieve it of its obligations otherwise to comply with the then-applicable orders and regulations of the Commission, and the Communications Act of 1934, as amended.

12. Applicable Law. This Agreement shall be governed by and construed in accordance with Communications Act of 1934, as amended, then-applicable Commission orders and regulations, as amended, and federal law.

13. Successors, Assigns, Designated Agents. Subject to the provisions of Section 2 of this Agreement regarding the restriction upon Debtor's ability to assign the License, this Agreement shall be binding upon Debtor, its successors and assigns and shall inure to the benefit of the Commission, and its successors and assigns. The Commission may designate agents other than the Commission to act on its behalf with respect to any and all rights and remedies of the Commission under this Agreement or the Note, and such designee shall have all of the rights, powers and remedies available to the Commission within the scope of its designation. Nothing herein, however, shall be construed as granting Debtor any right to sell or assign the License.

14. Singular and Plural. Wherever used, the singular number shall include the plural, the plural shall include the singular, and the use of any gender shall be applicable to all genders.

15. Financing Statements. To the extent permitted by applicable law, Debtor authorizes the Commission to sign and file financing statements at any time with respect to any of the Collateral without the signature of Debtor. Debtor will, however, at the same time and from time to time, execute such financing statements, agreements and other instruments and perform such acts as Commission may request in order to establish and maintain a validly perfected first priority security interest in the Collateral. All reasonable costs of filing and recording will be paid by Debtor.

16. Indemnification. Debtor hereby agrees to defend, indemnify and hold harmless Secured Party and its employees, officers and agents, from and against any and all liabilities, claims and obligations which may be incurred, asserted or imposed upon them or any of them as a result of or in connection with any use, operation, lease or consumption of any of the Collateral or as a result of Secured Party's seeking to obtain performance of any of the obligations due with respect to the Collateral.

17. Notices. All notices, requests and demands hereunder shall be in writing and shall be deemed to have been duly given, made or served on the earliest of (I) three (3) business days after the date mailed if sent by first-class U.S. mail, postage prepaid, (ii) actual delivery thereof if delivered by hand to the party to be notified, (iii) receipt thereof if sent by express mail or

other overnight courier service, or (iv) transmission to the telecopier number listed below for the party to be notified if sent within normal business hours or, otherwise, on the next business day thereafter. In each case such notification with respect to the Debtor and the Commission shall be addressed as set forth below or as may be hereafter designed by the respective parties hereto.

As to Debtor:

General Counsel
NextWave Personal
Communications Inc.
6256 Greenwich Drive
Suite 500
San Diego, CA 92122

Copy to:

Office of Regulatory Affairs
NextWavePersonal
Communications Inc.
101 Pennsylvania Ave., NW
Suite 805
Washington, D.C. 20004

As to the Commission:

U.S. DEPARTMENT OF TREASURY
P.O. BOX 44093
WASHINGTON, D.C. 20025-4093 [20026-4093]
ATTN: FCC FMS/DEBT MANAGEMENT SERVICE

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered as of the day and year first above written.

DEBTOR: NEXTWAVE PERSONAL COMMUNICATIONS, INC.

Date: 2/19/97 By: ALLEN SALMASI

Its: CEO, President, and Chairman of the Board

FEDERAL COMMUNICATIONS COMMISSION

Date: 3/6/97 By: Marilyn J. McDermott

Its: Associate Managing Director for Operations (or Designee)

APPENDIX P

1. 11 U.S.C. 362 (2000) provides:

§ 362 Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section—

(A) of the commencement or continuation of an action or proceeding for—

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection

of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[(5) Repealed. Pub. L. 105-277, div. I, title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681-886;]

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title,

arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46

(including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the

Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may

determine for cause by order entered within that 90-day period)—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-

day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

2. 11 U.S.C. 525 provides:

§ 525. Protection against discriminatory treatment

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(b) No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt—

(1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;

(2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

(c)(1) A governmental unit that operates a student grant or loan program and a person engaged in a business that includes the making of loans guaranteed or insured under a student loan program may not deny a grant, loan, loan guarantee, or loan insurance to a person that is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, or another person with whom the debtor or bankrupt has been associated, because the debtor or bankrupt is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of a case under this title or during the pendency of the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(2) In this section, "student loan program" means the program operated under part B, D, or E of title IV of the Higher Education Act of 1965 or a similar program operated under State or local law.

3. 28 U.S.C. 1334 (2000)

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district court shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (other than a decision not to

abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

4. 47 U.S.C. 309(j) (1994) provides:

§ 309. Application for license

* * * * *

(j) Use of competitive bidding

(1) General authority

If mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum described in paragraph (2), the Commission shall have the authority, subject to paragraph (10), to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection.

(2) Uses to which bidding may apply

A use of the electromagnetic spectrum is described in this paragraph if the Commission determines that—

(A) the principal use of such spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers in return for which the licensee—

(i) enables those subscribers to receive communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate; or

(ii) enables those subscribers to transmit directly communications signals utilizing frequencies on which the licensee is licensed to operate; and

(B) a system of competitive bidding will promote the objectives described in paragraph (3).

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innova-

tive technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and

(D) efficient and intensive use of the electromagnetic spectrum.

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall—

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in

and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures; and

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this

subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b) and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall—

(A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;

(B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter (other than subsections (d)(2) and (e) of this section);

(C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;

(D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;

(G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology; or

(H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will

be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

(8) Treatment of revenues

(A) General rule

Except as provided in subparagraph (B), all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of title 31.

(B) Retention of revenues

Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis. Any funds appropriated to the Commission for fiscal years 1994 through 1998 for the purpose of assigning licenses using random selection under subsection (i) of this section shall be used by the Commission to implement this subsection.

(9) Use of former Government spectrum

The Commission shall, not later than 5 years after August 10, 1993, issue licenses and permits pursuant to this subsection for the use of bands of frequencies that—

(A) in the aggregate span not less than 10 megahertz; and

(B) have been reassigned from Government use pursuant to part B of the National Telecommunications and Information Administration Organization Act [47 U.S.C. 921 et seq.].

(10) Authority contingent on availability of additional spectrum

(A) Initial conditions

The Commission's authority to issue licenses or permits under this subsection shall not take effect unless—

(i) the Secretary of Commerce has submitted to the Commission the report required by section 113(d)(1) of the National Telecommunications and Information Administration Organization Act [47 U.S.C. 923(d)(1)];

(ii) such report recommends for immediate reallocation bands of frequencies that, in the aggregate, span not less than 50 megahertz;

(iii) such bands of frequencies meet the criteria required by section 113(a) of such Act [47 U.S.C. 923(a)]; and

(iv) the Commission has completed the rulemaking required by section 332(c)(1)(D) of this title.

(B) Subsequent conditions

The Commission's authority to issue licenses or permits under this subsection on and after 2 years after August 10, 1993, shall cease to be effective if—

(i) the Secretary of Commerce has failed to submit the report required by section 113(a) of the National Telecommunications and Information Administration Organization Act [47 U.S.C. 923(a)];

(ii) the President has failed to withdraw and limit assignments of frequencies as required by paragraphs (1) and (2) of section 114(a) of such Act [47 U.S.C. 924(a)];

(iii) the Commission has failed to issue the regulations required by section 115(a) of such Act [47 U.S.C. 925(a)];

(iv) the Commission has failed to complete and submit to Congress, not later than 18 months after August 10, 1993, a study of current and future spectrum needs of State and local government public safety agencies through the year 2010, and a specific plan to ensure that adequate frequencies are made available to public safety licensees; or

(v) the Commission has failed under section 332(c)(3) of this title to grant or deny within the time required by such section any petition that a State has filed within 90 days after August 10, 1993;

until such failure has been corrected.

(11) Termination

The authority of the Commission to grant a license or permit under this subsection shall expire September 30, 1998.

(12) Evaluation

Not later than September 30, 1997, the Commission shall conduct a public inquiry and submit to the Congress a report—

(A) containing a statement of the revenues obtained, and a projection of the future revenues, from the use of competitive bidding systems under this subsection;

(B) describing the methodologies established by the Commission pursuant to paragraphs (3) and (4);

(C) comparing the relative advantages and disadvantages of such methodologies in terms of attaining the objectives described in such paragraphs;

(D) evaluating whether and to what extent—

(i) competitive bidding significantly improved the efficiency and effectiveness of the process for granting radio spectrum licenses;

(ii) competitive bidding facilitated the introduction of new spectrum-based technologies and the entry of new companies into the telecommunications market;

(iii) competitive bidding methodologies have secured prompt delivery of service to rural areas and have adequately addressed the needs of rural spectrum users; and

(iv) small businesses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process; and

(E) recommending any statutory changes that are needed to improve the competitive bidding process.

(13) Recovery of value of public spectrum in connection with pioneer preferences

(A) In general

Notwithstanding paragraph (6)(G), the Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make significant contributions to the development of a new telecommunications service or technology, except in accordance with the requirements of this paragraph.

(B) Recovery of value

The Commission shall recover for the public a portion of the value of the public spectrum resource made available to such person by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by—

(i) identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(ii) dividing each such winning bid by the population of its service area (hereinafter referred to as the per capita bid amount);

(iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);

(iv) reducing such average amount by 15 percent; and

(v) multiplying the amount determined under clause (iv) by the population of the service area of the license obtained by such person.

(C) Installments permitted

The Commission shall require such person to pay the sum required by subparagraph (B) in a lump sum or in guaranteed installment payments, with or without royalty payments, over a period of not more than 5 years.

(D) Rulemaking on pioneer preferences

Except with respect to pending applications described in clause (iv) of this subparagraph, the Commission shall prescribe regulations specifying the procedures and criteria by which

the Commission will evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service. Such regulations shall—

(i) specify the procedures and criteria by which the significance of such contributions will be determined, after an opportunity for review and verification by experts in the radio sciences drawn from among persons who are not employees of the Commission or by any applicant for such preferential treatment;

(ii) include such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses under this subsection;

(iii) be prescribed not later than 6 months after December 8, 1994;

(iv) not apply to applications that have been accepted for filing on or before September 1, 1994; and

(v) cease to be effective on the date of the expiration of the Commission's authority under subparagraph (F).

(E) Implementation with respect to pending applications

In applying this paragraph to any broadband licenses in the personal communications service awarded pursuant to the preferential treatment accorded by the Federal Communications Commission in the Third Report and Order in General Docket 90-314 (FCC 93-550, released February 3, 1994)—

(i) the Commission shall not reconsider the award of preferences in such Third Report and Order, and the Commission shall not delay the grant of licenses based on such awards more than 15 days following December 8, 1994, and the award of such preferences and licenses shall not be subject to administrative or judicial review;

(ii) the Commission shall not alter the bandwidth or service areas designated for such licenses in such Third Report and Order;

(iii) except as provided in clause (v), the Commission shall use, as the most reasonably comparable licenses for purposes of subparagraph (B)(i), the broadband licenses in the personal communications service for blocks A and B for the 20 largest markets (ranked by population) in which no applicant has obtained preferential treatment;

(iv) for purposes of subparagraph (C), the Commission shall permit guaranteed

installment payments over a period of 5 years, subject to—

(I) the payment only of interest on unpaid balances during the first 2 years, commencing not later than 30 days after the award of the license (including any preferential treatment used in making such award) is final and no longer subject to administrative or judicial review, except that no such payment shall be required prior to the date of completion of the auction of the comparable licenses described in clause (iii); and

(II) payment of the unpaid balance and interest thereon after the end of such 2 years in accordance with the regulations prescribed by the Commission; and

(v) the Commission shall recover with respect to broadband licenses in the personal communications service an amount under this paragraph that is equal to not less than $400,000,000, and if such amount is less than $400,000,000, the Commission shall recover an amount equal to $400,000,000 by allocating such amount among the holders of such licenses based on the population of the license areas held by each licensee.

The Commission shall not include in any amounts required to be collected under clause

(v) the interest on unpaid balances required to be collected under clause (iv).

(F) Expiration

The authority of the Commission to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service shall expire on September 30, 1998.

(G) Effective date

This paragraph shall be effective on December 8, 1994, and apply to any licenses issued on or after August 1, 1994, by the Federal Communications Commission pursuant to any licensing procedure that provides preferential treatment (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service.

5. 47 U.S.C. 309(j) (2000) provides:

§ 309. Application for license

* * * * *

(j) Use of competitive bidding

(1) General authority

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission—

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that—

(i) are used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and ser-

vices for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum; and

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed—

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall—

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits; and

(F) prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b) and 310 of this title. Consistent with the objectives described in

paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall—

(A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;

(B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter (other than subsections (d)(2) and (e) of this section);

(C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;

(D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service

regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;

(G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology; or

(H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

(8) Treatment of revenues

(A) General rule

Except as provided in subparagraph (B), all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of title 31.

(B) Retention of revenues

Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections shall be

available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis. Such offsetting collections are authorized to remain available until expended. No sums may be retained under this subparagraph during any fiscal year beginning after September 30, 1998, if the annual report of the Commission under section 154(k) of this title for the second preceding fiscal year fails to include in the itemized statement required by paragraph (3) of such section a statement of each expenditure made for purposes of conducting competitive bidding under this subsection during such second preceding fiscal year.

(C) Deposit and use of auction escrow accounts

Any deposits the Commission may require for the qualification of any person to bid in a system of competitive bidding pursuant to this subsection shall be deposited in an interest bearing account at a financial institution designated for purposes of this subsection by the Commission (after consultation with the Secretary of the Treasury). Within 45 days following the conclusion of the competitive bidding—

(i) the deposits of successful bidders shall be paid to the Treasury;

(ii) the deposits of unsuccessful bidders shall be returned to such bidders; and

(iii) the interest accrued to the account shall be transferred to the Telecommunications Development Fund established pursuant to section 614 of this title.

(9) Use of former Government spectrum

The Commission shall, not later than 5 years after August 10, 1993, issue licenses and permits pursuant to this subsection for the use of bands of frequencies that—

(A) in the aggregate span not less than 10 megahertz; and

(B) have been reassigned from Government use pursuant to part B of the National Telecommunications and Information Administration Organization Act [47 U.S.C. 921 et seq.].

(10) Authority contingent on availability of additional spectrum

(A) Initial conditions

The Commission's authority to issue licenses or permits under this subsection shall not take effect unless—

(i) the Secretary of Commerce has submitted to the Commission the report required by section 113(d)(1) of the National Telecommunications and Information Administration Organization Act [47 U.S.C. 923(d)(1)];

(ii) such report recommends for immediate reallocation bands of frequencies that, in the aggregate, span not less than 50 megahertz;

(iii) such bands of frequencies meet the criteria required by section 113(a) of such Act [47 U.S.C. 923(a)]; and

(iv) the Commission has completed the rulemaking required by section 332(c)(1)(D) of this title.

(B) Subsequent conditions

The Commission's authority to issue licenses or permits under this subsection on and after 2 years after August 10, 1993, shall cease to be effective if—

(i) the Secretary of Commerce has failed to submit the report required by section 113(a) of the National Telecommunications and Information Administration Organization Act [47 U.S.C. 923(a)];

(ii) the President has failed to withdraw and limit assignments of frequencies as required by paragraphs (1) and (2) of section 114(a) of such Act [47 U.S.C. 924(a)];

(iii) the Commission has failed to issue the regulations required by section 115(a) of such Act [47 U.S.C. 925(a)];

(iv) the Commission has failed to complete and submit to Congress, not later than

18 months after August 10, 1993, a study of current and future spectrum needs of State and local government public safety agencies through the year 2010, and a specific plan to ensure that adequate frequencies are made available to public safety licensees; or

(v) the Commission has failed under section 332(c)(3) of this title to grant or deny within the time required by such section any petition that a State has filed within 90 days after August 10, 1993;

until such failure has been corrected.

(11) Termination

The authority of the Commission to grant a license or permit under this subsection shall expire September 30, 2007.

(12) Evaluation

Not later than September 30, 1997, the Commission shall conduct a public inquiry and submit to the Congress a report—

(A) containing a statement of the revenues obtained, and a projection of the future revenues, from the use of competitive bidding systems under this subsection;

(B) describing the methodologies established by the Commission pursuant to paragraphs (3) and (4);

(C) comparing the relative advantages and disadvantages of such methodologies in terms of attaining the objectives described in such paragraphs;

(D) evaluating whether and to what extent—

(i) competitive bidding significantly improved the efficiency and effectiveness of the process for granting radio spectrum licenses;

(ii) competitive bidding facilitated the introduction of new spectrum-based technologies and the entry of new companies into the telecommunications market;

(iii) competitive bidding methodologies have secured prompt delivery of service to rural areas and have adequately addressed the needs of rural spectrum users; and

(iv) small businesses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process; and

(E) recommending any statutory changes that are needed to improve the competitive bidding process.

(13) Recovery of value of public spectrum in connection with pioneer preferences

(A) In general

Notwithstanding paragraph (6)(G), the Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make significant contributions to the development of a new telecommunications service or technology, except in accordance with the requirements of this paragraph.

(B) Recovery of value

The Commission shall recover for the public a portion of the value of the public spectrum resource made available to such person by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by—

(i) identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(ii) dividing each such winning bid by the population of its service area (here-

inafter referred to as the per capita bid amount);

(iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);

(iv) reducing such average amount by 15 percent; and

(v) multiplying the amount determined under clause (iv) by the population of the service area of the license obtained by such person.

(C) Installments permitted

The Commission shall require such person to pay the sum required by subparagraph (B) in a lump sum or in guaranteed installment payments, with or without royalty payments, over a period of not more than 5 years.

(D) Rulemaking on pioneer preferences

Except with respect to pending applications described in clause (iv) of this subparagraph, the Commission shall prescribe regulations specifying the procedures and criteria by which the Commission will evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service. Such regulations shall—

(i) specify the procedures and criteria by which the significance of such contributions will be determined, after an opportunity for review and verification by experts in the radio sciences drawn from among persons who are not employees of the Commission or by any applicant for such preferential treatment;

(ii) include such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses under this subsection;

(iii) be prescribed not later than 6 months after December 8, 1994;

(iv) not apply to applications that have been accepted for filing on or before September 1, 1994; and

(v) cease to be effective on the date of the expiration of the Commission's authority under subparagraph (F).

(E) Implementation with respect to pending applications

In applying this paragraph to any broadband licenses in the personal communications service awarded pursuant to the preferential treatment accorded by the Federal Communications Commission in the Third Report and Order in

General Docket 90-314 (FCC 93-550, released February 3, 1994)—

(i) the Commission shall not reconsider the award of preferences in such Third Report and Order, and the Commission shall not delay the grant of licenses based on such awards more than 15 days following December 8, 1994, and the award of such preferences and licenses shall not be subject to administrative or judicial review;

(ii) the Commission shall not alter the bandwidth or service areas designated for such licenses in such Third Report and Order;

(iii) except as provided in clause (v), the Commission shall use, as the most reasonably comparable licenses for purposes of subparagraph (B)(i), the broadband licenses in the personal communications service for blocks A and B for the 20 largest markets (ranked by population) in which no applicant has obtained preferential treatment;

(iv) for purposes of subparagraph (C), the Commission shall permit guaranteed installment payments over a period of 5 years, subject to—

(I) the payment only of interest on unpaid balances during the first 2 years, commencing not later than 30 days after the award of the license (including any preferential treatment used in making

such award) is final and no longer subject to administrative or judicial review, except that no such payment shall be required prior to the date of completion of the auction of the comparable licenses described in clause (iii); and

(II) payment of the unpaid balance and interest thereon after the end of such 2 years in accordance with the regulations prescribed by the Commission; and

(v) the Commission shall recover with respect to broadband licenses in the personal communications service an amount under this paragraph that is equal to not less than $400,000,000, and if such amount is less than $400,000,000, the Commission shall recover an amount equal to $400,000,000 by allocating such amount among the holders of such licenses based on the population of the license areas held by each licensee.

The Commission shall not include in any amounts required to be collected under clause (v) the interest on unpaid balances required to be collected under clause (iv).

(F) Expiration

The authority of the Commission to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant

contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service shall expire on August 5, 1997.

(G) Effective date

This paragraph shall be effective on December 8, 1994, and apply to any licenses issued on or after August 1, 1994, by the Federal Communications Commission pursuant to any licensing procedure that provides preferential treatment (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service.

(14) Auction of recaptured broadcast television spectrum

(A) Limitations on terms of terrestrial television broadcast licenses

A television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond December 31, 2006.

(B) Extension

The Commission shall extend the date described in subparagraph (A) for any station that requests such extension in any television market if the Commission finds that—

(i) one or more of the stations in such market that are licensed to or affiliated with one of the four largest national television networks are not broadcasting a digital television service signal, and the Commission finds that each such station has exercised due diligence and satisfies the conditions for an extension of the Commission's applicable construction deadlines for digital television service in that market;

(ii) digital-to-analog converter technology is not generally available in such market; or

(iii) in any market in which an extension is not available under clause (i) or (ii), 15 percent or more of the television households in such market—

(I) do not subscribe to a multichannel video programming distributor (as defined in section 522 of this title) that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market; and

(II) do not have either—

(a) at least one television receiver capable of receiving the digital television service signals of the television stations licensed in such market; or

(b) at least one television receiver of analog television service signals equipped with digital-to-analog converter technology capable of receiving the digital television service signals of the television stations licensed in such market.

(C) Spectrum reversion and resale

(i) The Commission shall—

(I) ensure that, as licenses for analog television service expire pursuant to subparagraph (A) or (B), each licensee shall cease using electromagnetic spectrum assigned to such service according to the Commission's direction; and

(II) reclaim and organize the electromagnetic spectrum in a manner consistent with the objectives described in paragraph (3) of this subsection.

(ii) Licensees for new services occupying spectrum reclaimed pursuant to clause (i) shall be assigned in accordance with this subsection. The Commission shall complete the assignment of such licenses, and report to the Congress the total revenues from such competitive bidding, by September 30, 2002.

(D) Certain limitations on qualified bidders prohibited

In prescribing any regulations relating to the qualification of bidders for spectrum

reclaimed pursuant to subparagraph (C)(i), the Commission, for any license that may be used for any digital television service where the grade A contour of the station is projected to encompass the entirety of a city with a population in excess of 400,000 (as determined using the 1990 decennial census), shall not—

(i) preclude any party from being a qualified bidder for such spectrum on the basis of—

(I) the Commission's duopoly rule (47 C.F.R. 73.3555(b)); or

(II) the Commission's newspaper cross-ownership rule (47 C.F.R. 73.3555(d)); or

(ii) apply either such rule to preclude such a party that is a winning bidder in a competitive bidding for such spectrum from using such spectrum for digital television service.

6. 47 C.F.R. 1.2110 (1997) provides:

§ 1.2110 Designated entities.

(a) Designated entities are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies.

(b) *Definitions.*

(1) *Small businesses.* The Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.

(2) *Businesses owned by members of minority groups and/or women.* Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by

non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. Members of minority groups include Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders.

(3) *Rural telephone companies.* A rural telephone company is any local exchange carrier including affiliates (as defined in 1.2110(b)(4)), with 100,000 access lines or fewer.

(4) *Affiliate.* (i) An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant under § 24.709 (both referred to herein as "the applicant") if such individual or entity—

(A) directly or indirectly controls or has the power to control the applicant, or

(B) is directly or indirectly controlled by the applicant, or

(C) is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(D) has an "identity of interest" with the applicant.

(ii) Nature of *control* in determining affiliation.

(A) Every business concern is considered to have one or more parties who directly or indirectly control or

have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(B) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(C) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10

percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(iii) *Identity of interest between and among persons.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or has the power to control a concern, persons with an identity of interest will be treated as though they were one person.

Example. Two shareholders in Corporation Y each have attributable interests in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity in interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

(A) *Spousal Affiliation.* Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(B) *Kinship Affiliation.* Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other

immediate family members. In this context *immediate family member* means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters.

Example. A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation Y is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(iv) *Affiliation through stock ownership.*

(A) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(B) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(C) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate

of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(v) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1. If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had come owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo

from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(vi) *Affiliation under voting trusts.*

(A) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(B) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(C) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(vii) *Affiliation through common management.* Affiliation generally arises where officers, directors, or

key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(viii) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(ix) *Affiliation through contractual relationships.* Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(x) *Affiliation under joint venture arrangements.*

(A) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor

in determining whether the business operation is a [j]oint venture.

(B) The parties to a joint venture are considered to be affiliated with each other.

(c) The Commission may set aside specific licenses for which only eligible designated entities, as specified by the Commission, may bid.

(d) The Commission may permit partitioning of service areas in particular services for eligible designated entities.

(e) The Commission may permit small businesses (including small businesses owned by women, minorities, or rural telephone companies that qualify as small businesses) and other entities determined to be eligible on a service-specific basis, which are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

(1) Unless otherwise specified, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer in the manner specified in § 1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within ten (10) business days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay penalties pursuant to § 1.2104(g)(2).

(2) Within ten (10) business days of the grant of the license application of a winning bidder eligible for

installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. Failure to remit the required payment will make the bidder liable to pay default payments pursuant to § 1.2104(g)(2).

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan and that it must execute a promissory note and security agreement as a condition of the installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

(i) Impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;

(ii) Allow installment payments for the full license term;

(iii) Begin with interest-only payments for the first two years; and

(iv) Amortize principal and interest over the remaining term of the license.

(4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.

(i) If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default.

(ii) Upon default or in anticipation of default of one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. If the Commission grants a request for a grace period, or otherwise approves a restructured payment schedule, interest will continue to accrue and will be amortized over the remaining term of the license.

(iii) Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to part 1, subpart O.

(f) The Commission may award bidding credits (i.e., payment discounts) to eligible designated entities. Competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

(g) The Commission may establish different up-front payment requirements for categories of designated entities in competitive bidding rules of particular auctionable services.

(h) The Commission may offer designated entities a combination of the available preferences or additional preferences.

(i) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that effect designated entity status, such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both *de facto* and *de jure* control of the entity. Such information must be maintained at the licensees' facilities or by their designated agents for the term of the license in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

(j) The Commission may, on a service-specific basis, permit consortia, each member of which individually meets the eligibility requirements, to qualify for any designated entity provisions.

(k) The Commission may, on a service-specific basis, permit publicly-traded companies that are owned by members of minority groups or women to qualify for any designated entity provisions.

7. 47 C.F.R. 1.2110 (1998) provides:

§ 1.2110 Designated entities.

(a) Designated entities are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies.

(b) *Definitions.*

(1) *Small businesses.* The Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.

(2) *Businesses owned by members of minority groups and/or women.* Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by

non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. The term minority includes individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction.

(3) *Rural telephone companies.* A rural telephone company is any local exchange carrier operating entity to the extent that such entity—

(i) provides common carrier service to any local exchange carrier study area that does not include either

(A) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census, or

(B) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(ii) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(iii) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(iv) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

(4) *Affiliate.* (i) An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant if such individual or entity—

(A) Directly or indirectly controls or has the power to control the applicant, or

(B) Is directly or indirectly controlled by the applicant, or

(C) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(D) Has an "identity of interest" with the applicant.

(ii) Nature of control in determining affiliation.

(A) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(B) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(C) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(iii) *Identity of interest between and among persons.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or has the power to control a concern, persons with an identity of interest will be treated as though they were one person.

Example. Two shareholders in Corporation Y each have attributable interests in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the

power to control Corporation Y. The two shareholders with these common investments (or identity in interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

(A) *Spousal affiliation.* Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(B) *Kinship affiliation.* Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters.

Example. A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation Y is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(iv) *Affiliation through stock ownership.* (A) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(B) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(C) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(v) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1. If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had come owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(vi) *Affiliation under voting trusts.* (A) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(B) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the

beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(C) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(vii) *Affiliation through common management.* Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(viii) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(ix) *Affiliation through contractual relationships.* Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(x) *Affiliation under joint venture arrangements.* (A) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(B) The parties to a joint venture are considered to be affiliated with each other. Nothing in this subsection shall be construed to define a small business consortium, for purposes of determining status as a designated entity, as a joint venture under attribution standards provided in this section.

(xi) *Exclusion from affiliation coverage.* For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section, except that gross revenues derived from gaming activities

conducted by affiliate entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 *et seq.*) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

(c) The Commission may set aside specific licenses for which only eligible designated entities, as specified by the Commission, may bid.

(d) The Commission may permit partitioning of service areas in particular services for eligible designated entities.

(e) *Bidding credits.* (1) The Commission may award bidding credits (*i.e.*, payment discounts) to eligible designated entities. Competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

(2) *Size of bidding credits.* A winning bidder that qualifies as a small business or a consortium of small businesses may use the following bidding credits corresponding to their respective average gross revenues for the preceding 3 years:

(i) Businesses with average gross revenues for the preceding years, 3 years not exceeding $3 million are eligible for bidding credits of 35 percent;

(ii) Businesses with average gross revenues for the preceding years, 3 years not exceeding $15 million are eligible for bidding credits of 25 percent; and

(iii) Businesses with average gross revenues for the preceding years, 3 years not exceeding $40 million are eligible for bidding credits of 15 percent.

(f) *Installment payments.* The Commission may permit small businesses (including small businesses owned by women, minorities, or rural telephone companies that qualify as small businesses) and other entities determined to be eligible on a service-specific basis, which are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

(1) Unless otherwise specified by public notice, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer in the manner specified in § 1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within ten (10) days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay a default payment pursuant to § 1.2104(g)(2).

(2) Within ten (10) days of the conditional grant of the license application of a winning bidder eligible for installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. If a winning bidder eligible for installment payments fails to submit this additional ten (10) percent of its high bid by

the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five percent of the amount due. When a winning bidder eligible for installment payments fails to submit this additional ten (10) percent of its winning bid, plus the late fee, by the late payment deadline, it is considered to be in default on its license(s) and subject to the applicable default payments. Licenses will be awarded upon the full and timely payment of second down payments and any applicable late fees.

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan and that it must execute a promissory note and security agreement as a condition of the installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

(i) Impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;

(ii) Allow installment payments for the full license term;

(iii) Begin with interest-only payments for the first two years; and

(iv) Amortize principal and interest over the remaining term of the license.

(4) A license granted to an eligible entity that elects installment payments shall be conditioned upon

the full and timely performance of the licensee's payment obligations under the installment plan.

(i) Any licensee that fails to submit payment on an installment obligation will automatically have an additional ninety (90) days in which to submit its required payment without being considered delinquent. Any licensee making its required payment during this period will be assessed a late payment fee equal to five percent (5%) of the amount of the past due payment. Late fees assessed under this paragraph will accrue on the next business day following the payment due date. Payments made at the close of any grace period will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement." Afterwards, payments will be applied in the following order: late charges, interest charges, principal payments.

(ii) If any licensee fails to make the required payment at the close of the 90-day period set forth in paragraph (i) of this section, the licensee will automatically be provided with a subsequent 90-day grace period, except that no subsequent automatic grace period will be provided for payments from C or F block licensees that are not made within 90 days of the payment resumption date for those licensees, as explained in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998). Any licensee making a required payment during this subsequent period will be assessed a late payment fee equal to ten percent (10%) of the amount of the past due payment.

Licensees shall not be required to submit any form of request in order to take advantage of the initial 90-day non-delinquency period and subsequent automatic 90-day grace period. All licensees that avail themselves of the automatic grace period must pay the required late fee(s), all interest accrued during the non-delinquency and grace periods, and the appropriate scheduled payment with the first payment made following the conclusion of the grace period.

(iii) If an eligible entity making installment payments is more than one hundred and eighty (180) days delinquent in any payment, it shall be in default, except that C and F block licensees shall be in default if their payment due on the payment resumption date, referenced in paragraph (f)(4)(ii) of this section, is more than ninety (90) days delinquent.

(iv) Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period, if such a grace period is available, will be deciared in default, its license will automatically cancel, and will be subject to debt collection procedures.

(g) The Commission may establish different up-front payment requirements for categories of designated entities in competitive bidding rules of particular auctionable services.

(h) The Commission may offer designated entities a combination of the available preferences or additional preferences.

(i) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that effect designated entity status, such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both *de facto* and *de jure* control of the entity. Such information must be maintained at the licensees' facilities or by their designated agents for the term of the license in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

(j) The Commission may, on a service-specific basis, permit consortia, each member of which individually meets the eligibility requirements, to qualify for any designated entity provisions.

(k) The Commission may, on a service-specific basis, permit publicly-traded companies that are owned by members of minority groups or women to qualify for any designated entity provisions.

(l) *Audits.* (1) Applicants and licensees claiming eligibility under this section shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (FCC Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures

and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding FCC-licensed service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(m) *Gross revenues.* Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently con.pleted calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent and must be prepared in accordance with Generally Accepted Accounting Principles.

Supreme Court
FILED
DEC - 1 2001
OFFICE OF THE CLERK

Nos. 01-653, 01-654, 01-657

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,
v.
NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, *Petitioner*,
v.
NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORP., *et al.*, *Petitioners*,
v.
NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Petitions For Writs Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR NEXTWAVE PERSONAL COMMUNICATIONS INC. AND NEXTWAVE POWER PARTNERS INC. IN OPPOSITION

DONALD B. VERRILLI, JR.
IAN HEATH GERSHENGORN
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

[Additional counsel listed on inside front cover]

THOMAS G. HUNGAR
Counsel of Record
DOUGLAS R. COX
MARK E. PAPADOPOULOS
CURTIS E. GANNON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondents

DEBORAH L. SCHRIER-RAPE
SCHRIER-RAPE, P.C.
5929 Westgrove Drive
Dallas, Texas 75248
(972) 818-6761

G. ERIC BRUNSTAD, JR.
BINGHAM DANA LLP
One State Street
Hartford, Connecticut 06103
(860) 240-2700

QUESTION PRESENTED

Section 525(a) of the Bankruptcy Code provides that "a governmental unit may not . . . revoke . . . a license . . . or other similar grant to . . . a bankrupt . . . solely because such bankrupt . . . has not paid a debt that is dischargeable" in bankruptcy. 11 U.S.C. § 525(a). The question raised in the petitions is whether the court of appeals correctly held that the plain language of § 525(a) precluded the Federal Communications Commission from revoking licenses held by a debtor in bankruptcy solely because such debtor had not made installment payments on debts that are dischargeable in bankruptcy.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. are both wholly owned subsidiaries of NextWave Telecom Inc. ("NTI"). No publicly traded company owns 10 percent or more of NTI's stock.

In addition to the petitioners in Nos. 01-653, 01-654, and 01-657, several intervenors in the proceeding below are also parties to this proceeding under Rule 12.6. They include the following:

AT&T Wireless Services, Inc. (more than 10 percent of the stock of which is owned by NTT DoCoMo);

BellSouth Corporation;

BellSouth Cellular Corporation;

Cellular Telecommunications Industry Association;

Cingular Wireless (more than 10 percent of the stock of which is owned by BellSouth Corporation);

Dobson Communications Corporation (more than 10 percent of the stock of which is owned by AT&T Wireless Services, Inc.);

Nextel Communications, Inc. (more than 10 percent of the stock of which is owned by Motorola, Inc., and its subsidiaries);

Sprint Spectrum L.P. d/b/a Sprint PCS (which is wholly owned by Sprint Corporation);

TeleCorp PCS, Inc. (more than 10 percent of the stock of which is owned by AT&T Wireless Services, Inc.); and

VoiceStream Wireless (which is wholly owned by Deutsche Telekom)

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

A. NextWave's Spectrum Licenses 1

B. NextWave's Bankruptcy Proceeding 3

C. The Attempt To Cancel NextWave's Licenses 5

D. The Second Circuit's Mandamus Decision 6

E. Judicial Review Of The Attempted Cancellation 7

F. Developments After The D.C. Circuit's Decision 10

REASONS FOR DENYING THE WRIT 11

I. The Judgment Below Does Not Conflict With The Decisions Of Any Other Court 11

A. No conflict exists between the decision below and the rulings of the Second Circuit 11

B. The judgment below does not conflict with the decisions of other circuits 13

II. The Question Presented Is Not Sufficiently Important To Warrant Review 15

A. The question presented is of narrow applicability and is unlikely to recur 16

TABLE OF CONTENTS
(continued)

Page

B. Review is inappropriate because alternative grounds justify the decision 19

C. This Court has already denied certiorari in a "closely related" case that had a far greater impact on the FCC's auction program 22

III. The Judgment Below Is Clearly Correct 24

A. The FCC's attempted "automatic" license revocation occurred "solely because" NextWave failed to pay its debt 24

B. NextWave's debt is "dischargeable" within the meaning of § 525(a) 27

C. Nothing in the Communications Act or the Bankruptcy Code allows the FCC to trump § 525(a) 29

CONCLUSION 30

APPENDIX A 1a

APPENDIX B 3a

APPENDIX C 6a

APPENDIX D 8a

TABLE OF AUTHORITIES

Page(s)

CASES

Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264 (9th Cir. 1990) 14

Exxon Mobil Corp. v. Baker, 531 U.S. 919 (2000) 22

In re 48th Street Steakhouse, Inc., 835 F.2d 427 (2d Cir. 1987) 20

In re Bill, 90 B.R. 651 (Bankr. D.N.J. 1988) 26

In re Cent. Ark. Broad. Co., 68 F.3d 213 (8th Cir. 1995) 20

In re Exquisito Servs., Inc., 823 F.2d 151 (5th Cir. 1987) 14

In re Fugazy Express, Inc., 124 B.R. 426 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992) 20

In re GWI PCS 1, Inc., 230 F.3d 788 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2623 (2001) 20,23,24

In re Tak Communications, Inc., 985 F.2d 916 (7th Cir. 1993) 20

In re Walker, 927 F.2d 1138 (10th Cir. 1991) 26

In re Williams, 158 B.R. 493 (Bankr. D. Idaho 1993) 26

Laracuente v. Chase Manhattan Bank, 891 F.2d 17 (1st Cir. 1989) 14

Lawson v. Murray, 515 U.S. 1110 (1995) 19

Ross v. Moffit, 417 U.S. 600 (1974) 24

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 19

TABLE OF AUTHORITIES
(continued)

Page(s)

Trinity Broad. of Florida, Inc. v. FCC, 211 F.3d 618 (D.C. Cir. 2000).....21

TRW Inc. v. Andrews, 122 S. Ct. 441 (2001) 21,29

United States v. GWI PCS 1, Inc., 245 B.R. 59 (N.D. Tex. 1999), *aff'd*, 230 F.3d 788 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2623 (2001) 3,22

United States v. Mitchell, 463 U.S. 206 (1983).....22

United States v. Whiting Pools, 462 U.S. 198 (1983) 20

Youakim v. Miller, 425 U.S. 231 (1976) 29

STATUTES AND REGULATIONS

11 U.S.C. § 101(5).....27

11 U.S.C. § 101(12).....27

11 U.S.C. § 106 29

11 U.S.C. § 362(a).....4,5

11 U.S.C. § 362(a)(4) 8,9,19,20

11 U.S.C. § 362(a)(5) 8,9,19,20

11 U.S.C. § 362(b)(4).....8,20,29

11 U.S.C. § 362(c).....4

11 U.S.C. § 363(c)(1) 4

11 U.S.C. § 365 17

11 U.S.C. § 365(b)(1).....18

11 U.S.C. § 503 18

11 U.S.C. § 507(a)(1) 18

TABLE OF AUTHORITIES
(continued)

Page(s)

11 U.S.C. § 523 27

11 U.S.C. § 525(a).....5,8,28

11 U.S.C. § 541(a)(1)(B).....4

11 U.S.C. § 544 4

11 U.S.C. § 1123 5

11 U.S.C. § 1123(a).....22

11 U.S.C. § 1123(a)(5)(G).....22

11 U.S.C. § 1124 5

11 U.S.C. § 1129(a)(9)(A).....18

11 U.S.C. § 1141(d)(1)(A) 27,28

28 U.S.C. § 2342 12

47 U.S.C. § 309(j)(6)(C) 30

47 U.S.C. § 402 6,7,12,13

47 C.F.R. § 1.2109(a) (2000) 17

47 C.F.R. § 1.2110(e)(4)(iii) (1997).....21

47 C.F.R. § 1.2110(f)(4)(iv) (1998) 21

OTHER AUTHORITIES

4 COLLIER ON BANKRUPTCY ¶ 525.02 (15th ed. rev. 2001) 26

In re Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, 13 FCC Rcd. 374 (1997).....16

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Amendment of Part I of the Commission's Rules-Competitive Bidding Procedures, 15 FCC Rcd. 21,520 (2000) 16

Competitive Bidding Proceeding, 63 Fed. Reg. 2315 (1998) 17

H.R. REP. NO. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963 10,17,25

S. REP. NO. 75-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 26

Jeff Bounds, *Out of Pocket: Creditors Plan New Wireless Firm*, DALLAS BUS. J., Apr. 10, 1998 3

Yochi J. Dreazen & Pui-Wing Tam, *Qualcomm to Invest in NextWave, Center of Wireless-Market Dispute*, WALL ST. J., Aug. 17, 2001 10

BRIEF IN OPPOSITION

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. (collectively, "NextWave") respectfully submit this brief in opposition to the three petitions for certiorari in this case. NextWave's reorganization proceedings have given rise to two previous denials of certiorari by this Court. The same result should occur here, as the petitions do not present an issue warranting review by the Court. The decision below implements the plain language of Bankruptcy Code § 525(a); it does not conflict with any decisions of the courts of appeals or of this Court; it is supported by alternative grounds that are not included within the question presented in the petitions; and the question presented is unlikely to recur, as it arises in the context of a unique financing program that has since been abandoned. Accordingly, certiorari should be denied.

STATEMENT OF THE CASE

Although the statutory provision governing this case is straightforward and unambiguous, the complex factual and procedural history serves only to confirm the unique nature of the question presented and the absence of any realistic possibility that this question will continue to arise in the future.

A. NextWave's Spectrum Licenses

NextWave was formed in 1995 as a "designated entity" to develop a business as a nationwide wholesaler of wireless services and airtime. During the FCC's C-Block auctions that concluded in May 1996 and a reauction in July 1996, NextWave was the high bidder for 63 licenses, with bids that totaled $4.74 billion. In compliance with FCC regulations, NextWave promptly made a $237 million down payment to the FCC and filed applications for the licenses. Pet. App. 312a-313a.

The FCC did not approve NextWave's license applications until early the following year, whereupon NextWave

made an additional $237 million payment. Pet. App. 313a. The FCC formally issued NextWave's C-Block licenses in February 1997, took a security interest in each license, and filed UCC financing statements in several states to perfect its liens against the licenses. *Id.* at 40a, 159a n.7. NextWave signed promissory notes to the FCC reflecting the balance of the amounts owed on the licenses. *Id.* at 313a.[1]

In the months after the C-Block auctions concluded, NextWave made significant progress toward building out its network. By early 1997, NextWave had 22 offices around the country and employed more than 600 employees and contractors. C.A. App. 1184-85. In addition to raising over $600 million of initial working capital, the company had secured more than $2 billion in financing commitments from major vendors for deployment of network equipment, and was working with leading investment banking firms to secure additional working capital financing. By mid-1997, NextWave had obtained 90 percent of the microwave links necessary for its initial launch, had 7 switch sites, and had prepared 30 percent of its cell sites for build-out. *Id.* at 1185. NextWave expected to launch service in 4 major markets in late 1997 and had completed engineering designs for 22 markets. The company had also entered into airtime purchase contracts with other wireless carriers committing them to purchase in excess of 35 billion minutes of use from NextWave on a wholesale basis. *Id.*

Before NextWave finally received its C-Block licenses in February 1997, the FCC held another round of auctions, flooding the spectrum market with nearly 1500 additional PCS licenses. Pet. App. 309a. With the release of so many additional licenses, the market price for spectrum fell dramatically, to less than one-quarter of the high bids at the C-

[1] NextWave was also granted a number of F-Block licenses for which it was the high bidder at subsequent auctions. Pet. App. 313a-314a. NextWave made down payments of $28 million to the FCC reflecting a portion of the purchase price for those licenses and signed promissory notes for the balance of the bid amounts.

Block auctions. *Id.* at 310a. As a result, the vast majority of C-Block licensees experienced great difficulty securing the financing necessary to build out their networks and make payments on their debts to the FCC.

In response to those difficulties, the FCC initiated a series of proceedings to restructure the payment and financing obligations of C-Block licensees and temporarily suspended their installment payment obligations. Pet. App. 5a-6a. Despite this temporary respite, the second- and third-largest C-Block license holders—Pocket Communications and GWI PCS—each filed for bankruptcy during 1997. GWI also filed a fraudulent conveyance action, seeking to reduce the amount of its license-related debts to the FCC. The bankruptcy court ruled for GWI and, on June 4, 1998, reduced GWI's payment obligations to the FCC by 80 percent. *See United States v. GWI PCS 1, Inc.*, 245 B.R. 59, 61 (N.D. Tex. 1999), *aff'd*, 230 F.3d 788 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2623 (2001).[2]

Unlike GWI and Pocket, NextWave did not immediately file for bankruptcy. Instead, NextWave continued its efforts to obtain additional financing and build out its network. NextWave sought to stave off bankruptcy by curtailing its operations and laying off hundreds of employees and contractors, but those efforts proved insufficient. By mid-1998, NextWave owed more than $400 million to trade and financial creditors, and faced attachment proceedings across the country. C.A. App. 1187-88.

B. NextWave's Bankruptcy Proceeding

To preserve assets for the benefit of creditors, and to sustain the company as an ongoing enterprise, NextWave filed for Chapter 11 bankruptcy protection on June 8, 1998. As

[2] In the Pocket Communications bankruptcy proceeding, the FCC agreed in March 1998 to a reorganization plan that allowed 14 C-Block licenses to be retained for only 63 percent of what Pocket had bid for them. *See* Jeff Bounds, *Out of Pocket: Creditors Plan New Wireless Firm*, DALLAS BUS. J., Apr. 10, 1998.

contemplated by the Bankruptcy Code, NextWave's bankruptcy filing was made to provide it with breathing room sufficient to preserve its assets and permit it to reorganize its business. Once in bankruptcy, NextWave made no payments to creditors, including the FCC, in keeping with the Bankruptcy Code's general prohibition against the payment of prepetition debts while in bankruptcy (*see* 11 U.S.C. §§ 363(c)(1), 541(a)(1)(B)) and the Code's "automatic stay" provision, which generally suspends collection and payment of debts incurred before bankruptcy. *See* 11 U.S.C. § 362(a), (c). The FCC itself conceded the applicability of this fundamental tenet of bankruptcy law, reassuring the bankruptcy court that "NextWave will still enjoy bankruptcy protection from collection of C Block license payments pending reorganization of its business affairs." Pet. App. 181a (emphasis omitted).

In reliance on the fraudulent conveyance decision in *GWI*, and pursuant to its fiduciary duty to protect its creditors and investors, NextWave also brought an action in the bankruptcy court under 11 U.S.C. § 544, seeking to adjust the FCC's claims to reflect the value of the licenses on the date that NextWave finally received them. The bankruptcy court ruled in NextWave's favor. *See* Pet. App. 138a-141a.

The FCC appealed, and the district court affirmed. Pet. App. 254a-272a. On further appeal, however, the Second Circuit reversed. *Id.* at 213a-253a. Noting that "jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals," the Second Circuit concluded that the bankruptcy and district courts "were utterly without the power" to rule on NextWave's retention of its licenses. *Id.* at 233a-234a, 236a.

In December 1999, NextWave submitted a new plan of reorganization which addressed the Second Circuit's decision, providing for full payment to the FCC and other creditors, including all past-due amounts, penalties, and interest. Pet. App. 146a-147a. On January 11, 2000, NextWave submitted an enhanced proposal to the FCC, contemplating "a single lump sum payment to satisfy its entire $4.3 billion out-

standing obligation" to the FCC. *Id.* at 12a. NextWave's plan was scheduled for a confirmation hearing in the bankruptcy court on January 21, 2000. Thus, within 18 months of seeking bankruptcy protection, NextWave had rehabilitated itself and was poised to fulfill the purposes of the Bankruptcy Code with a plan of reorganization that would pay all creditors in full.

C. The Attempt To Cancel NextWave's Licenses

The FCC refused to accept NextWave's offer of full payment. Instead, on January 12, 2000—just nine days before the scheduled confirmation hearing—the FCC objected to NextWave's proposed plan and issued a public notice announcing that NextWave's licenses would be reauctioned. Pet. App. 96a-101a, 147a-148a; C.A. App. 452-63. The FCC asserted that NextWave's licenses had automatically canceled more than a year earlier, because NextWave, in accordance with its obligations as a debtor in bankruptcy, had not made installment payments to the FCC during the bankruptcy proceedings. Pet. App. 96a-97a (asserting that license cancellation occurred for certain licensees like NextWave that "were participating in the Commission's installment payment plan and were more than 90 days delinquent for the July 31, 1998 resumption payment"); C.A. App. 452-55. The FCC had never previously expressed the view that the licenses had automatically canceled, and instead had repeatedly made contrary representations to the bankruptcy and district courts. Pet. App. 21a-22a, 148a, 181a-186a.

NextWave sought relief in the bankruptcy court, which held that the FCC's attempted cancellation and reauction of NextWave's licenses violated multiple provisions of the Bankruptcy Code, including the automatic stay (11 U.S.C. § 362(a)) and the debtor's right to cure defaults (11 U.S.C. §§ 1123, 1124). Pet. App. 134a-212a.[3] The court also held

---

[3] The bankruptcy court did not rule on the merits of NextWave's claim that the FCC's attempted cancellation also violated 11 U.S.C. § 525(a). Pet. App. 168a.

that the attempted cancellation was irreconcilable with the FCC's prior representations that the licenses had not canceled, describing the FCC's about-face as "shocking." Pet. App. 135a, 181a-191a. The court identified numerous instances in which the FCC and its counsel had acted in a manner directly inconsistent with the late-blooming automatic cancellation theory. For example, the FCC's counsel specifically represented that NextWave's licenses had not been "automatically cancelled .... in this case due to the automatic stay," and the FCC confirmed that "[d]uring the pendency of the bankruptcy, the Bankruptcy Court and the automatic stay would hold the creditors at bay, including the Federal Communications Commission." *Id.* at 182a (emphasis omitted).

D. The Second Circuit's Mandamus Decision

The FCC sought mandamus relief from the Second Circuit, which vacated the bankruptcy court's order. Pet. App. 102a-133a. The Second Circuit held that mandamus was warranted because the bankruptcy court lacked jurisdiction to review the FCC's cancellation of NextWave's licenses. The Second Circuit explained that "[e]xclusive jurisdiction over review of final FCC orders is vested in the Courts of Appeals" under 47 U.S.C. § 402, which vests exclusive jurisdiction to review FCC orders in the federal courts of appeals (here, the D.C. Circuit). Pet. App. 128a-129a (quoting *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984)); *see also id.* at 108a ("review of the FCC's regulatory decisions and orders is entrusted solely to the federal courts of appeals and is therefore outside the jurisdiction of the bankruptcy and district courts"); *id.* at 124a.

The Second Circuit emphasized, however, that in a § 402 proceeding before the D.C. Circuit, NextWave would be "free to pursue its challenge to the FCC's regulatory acts." Pet. App. 131a. Thus, the court repeatedly and emphatically declined to adjudicate the validity of the attempted cancellation. *Id.* at 103a ("We make no comment on the prospects of the (precautionary) appeals filed by NextWave in the Court

of Appeals for the District of Columbia Circuit."); *id.* at 126a n.8 ("we have no occasion to opine on whether the Public Notice [announcing the license cancellation] is valid or whether the Licenses automatically canceled at some prior date"); *id.* at 127a ("we have no occasion to express an opinion" on whether "the bankruptcy court is right on the merits of its arguments against revocation").[4]

E. Judicial Review Of The Attempted Cancellation

Prior to the FCC's commencement of the mandamus proceeding in the Second Circuit, NextWave had filed with the FCC a petition for reconsideration of the automatic cancellation. The FCC denied NextWave's petition in September 2000, opining (without analysis) that the Second Circuit's May 2000 mandamus decision had already resolved NextWave's bankruptcy-related challenges. *Id.* at 83a.

Consistent with the Second Circuit's mandamus decision, NextWave appealed to the D.C. Circuit pursuant to 47 U.S.C. § 402, asserting that the FCC's cancellation decision was arbitrary and capricious and contrary to law in violation of the Administrative Procedure Act and the Bankruptcy Code. Despite the pendency of that appeal, the FCC chose to reauction NextWave's licenses to third parties beginning in December 2000.[5] The FCC's auction notice and rules spe-

---

[4] Although the Second Circuit addressed the applicability of the police-power exception to the automatic stay (§ 362(b)(4)), it did so only as part of its jurisdictional analysis. Pet. App. 126a & n.8. The Second Circuit was entirely silent about NextWave's claims under § 525(a).

[5] NextWave asked the FCC and the D.C. Circuit to stay the reauction. In response, the FCC explained to the D.C. Circuit that it "ha[d] expressly conditioned the results of the auction on the outcome of this case" and that, "notwithstanding the auction, if NextWave prevails before this Court it will get its licenses back." App., *infra*, 1a, 2a. Several large telecommunications companies, including the petitioner in No. 01-654 and one of the petitioners in No. 01-657, intervened in the D.C. Circuit to oppose a stay of the reauction; they also stressed the reauction's conditional nature.

cifically cautioned prospective bidders that the results would be subject to the outcome of NextWave's pending legal challenges to the license cancellation. Thus, all bidders (including petitioners in Nos. 01-654 and 01-657) were on notice of NextWave's claims to the licenses. The reauction concluded in January 2001, but the FCC never issued licenses to the high bidders in the reauction for the spectrum covered by NextWave's licenses.

In June 2001, the D.C. Circuit reversed the FCC's attempted cancellation of NextWave's licenses. Pet. App. 1a-51a. The court held that the cancellation violated Bankruptcy Code § 525(a), and also concluded that NextWave's licenses were protected by the lien-enforcement provisions of the automatic stay, 11 U.S.C. § 362(a)(4)-(5).

The D.C. Circuit repeatedly stressed the direct applicability of the plain language of § 525(a), which declares that "a governmental unit may not . . . revoke . . . a license . . . or other similar grant to . . . a bankrupt . . . solely because such bankrupt . . . has not paid a debt that is dischargeable . . . under this title." 11 U.S.C. § 525(a); *see* Pet. App. 39a, 46a. Because the attempted license cancellation was triggered solely by NextWave's failure to make a payment while under the protection of the bankruptcy laws, the court concluded that the FCC's cancellation attempt constituted a clear violation of § 525(a). *Id.* at 38a.

The D.C. Circuit also rejected each of petitioners' attempts to evade application of the plain language of § 525(a). First, the court refuted the FCC's contention that § 525(a)'s limitations on license cancellation should be no broader than the automatic stay in § 362, which (unlike § 525(a)) contains a general exception for actions enforcing "police and regulatory power." 11 U.S.C. § 362(b)(4). The court described that contention as "inconsistent with § 525's plain language"

App., *infra*, 3a-5a. Following these assurances that NextWave would not suffer irreparable injury, the D.C. Circuit declined to stay the reauction.

and with case law demonstrating that "section 525 can apply even if the automatic stay does not." Pet. App. 39a.

In addition, the D.C. Circuit held that "section 362's automatic stay *does* apply here." *Id.* at 41a (emphasis in original). The court explained that the FCC's attempted cancellation of the licenses constituted lien-enforcement behavior that violated 11 U.S.C. § 362(a)(4)-(5), provisions of the automatic stay to which the police-power exception does not apply. Pet. App. 40a-41a.

The D.C. Circuit next rejected petitioners' arguments that NextWave's license-related debt was not "dischargeable" within the meaning of § 525(a). The court explained that the Second Circuit had not resolved that issue, or indeed any questions about the application of § 525(a). *Id.* at 30a-32a, 41a-42a. Nor was the D.C. Circuit persuaded by the FCC's claim that NextWave's obligation to pay is a "regulatory requirement" and therefore not a "debt." As the court concluded (and as FCC counsel conceded below, Pet. App. 43a), this semantic recharacterization would require a court to import an implied regulatory-purpose exception into § 525(a), flouting the structure of the Bankruptcy Code and violating basic principles of statutory construction. Not only do other prohibitions in the Code contain express regulatory exceptions (*e.g.*, parts of the automatic stay), but § 525(a) itself expressly exempts certain government actions (*e.g.*, by the Department of Agriculture), thus confirming that Congress did not intend to create an exemption for other agencies such as the FCC. Pet. App. 43a-44a.

The D.C. Circuit also found that the FCC cancelled NextWave's licenses "solely because" of NextWave's failure to make a payment while in bankruptcy. The court explained that the FCC made no effort whatsoever to consider any "extrinsic evidence of fitness to hold a license" (Pet. App. 47a), and instead used NextWave's missed payment as the "'sole' trigger" for its automatic cancellation. *Id.* at 45a. Indeed, the FCC "never denie[d] that if NextWave had made its payments, the company could have retained its licenses." *Id.* at 38a. By looking at "no other factor [than non-payment] in

determining whether NextWave should retain its licenses" (*ibid.*), the FCC violated the purpose of § 525, which is precisely "to prevent an automatic reaction" against a debtor who "avail[s] himself of the protection of the bankruptcy laws." *Id.* at 46a (quoting H.R. REP. NO. 95-595, at 165 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6126).

Because of its resolution of NextWave's claims under § 525(a) and the automatic stay, the D.C. Circuit found it unnecessary to decide whether the FCC's attempted cancellation also violated NextWave's right to cure and fundamental principles of due process, fair notice, and estoppel.

In August 2001, the FCC sought a stay of the D.C. Circuit's mandate. Concluding that the FCC had not demonstrated that its petition for a writ of certiorari "would present a substantial question," the court unanimously denied the motion. App., *infra*, 6a-7a.

F. Developments After The D.C. Circuit's Decision

In the months following the D.C. Circuit's decision, NextWave resumed implementation of its plans to emerge from bankruptcy and build out a nationwide third-generation wireless network. Within 45 days of the D.C. Circuit's decision, on August 6, 2001, NextWave filed a new plan of reorganization with the bankruptcy court, again providing for full payment to all creditors, including the FCC. To accomplish the build-out of its network, NextWave also secured financing commitments totaling approximately $5 billion and entered into a $100 million hardware contract with Lucent Technologies to continue deploying its advanced wireless network while still in bankruptcy. *See* Yochi J. Dreazen & Pui-Wing Tam, *Qualcomm to Invest in NextWave, Center of Wireless-Market Dispute*, WALL ST. J., Aug. 17, 2001, at B3. With Lucent's assistance, NextWave has been progressing rapidly with completing the build-out of its network.

After the petitions for writs of certiorari were filed in this case, the FCC and the other petitioners reached a contingent settlement of this litigation with NextWave that would have left the D.C. Circuit's decision intact and unreviewable.

See App., *infra*, 8a-9a. That agreement terminated by its terms on December 31, 2001, due to a lack of implementing legislation. Throughout its bankruptcy, NextWave has pursued the build-out of its wireless network. Indeed, as of January 31, 2002, NextWave had already deployed operational wireless facilities in more than 50 markets. NextWave intends to deploy operational systems in its remaining markets within the first half of this year, and plans to offer commercial services within the same time frame.

REASONS FOR DENYING THE WRIT

I. The Judgment Below Does Not Conflict With The Decisions Of Any Other Court

The D.C. Circuit's decision does not conflict with the decisions of any other court. Instead, the decision below reflects nothing more than a straightforward application of the plain language of § 525(a) to the particular facts of this case. No other appellate court has ever addressed the application of § 525(a) in this context.

A. No conflict exists between the decision below and the rulings of the Second Circuit

Petitioners allege that there is a conflict between the judgment below and the earlier decisions of the Second Circuit in this litigation. *See* FCC Pet. 13 (identifying purported "conflict" between the D.C. Circuit "holding" and the Second Circuit "analysis"); *see also id.* at 30; Verizon Pet. 19; Arctic Pet. 13. Petitioners are mistaken. The D.C. Circuit squarely rejected as "implausible" petitioners' contention that the Second Circuit adjudicated the merits of NextWave's claims. Pet. App. 30a. Instead, the D.C. Circuit correctly recognized the Second Circuit's holding as jurisdictional in nature: "the Second Circuit principally decided . . . that the bankruptcy court *lacked jurisdiction*" to apply the Code to these acts. Pet. App. 31a (emphasis added); *see also id.* at 25a ("the Second Circuit repeatedly stated that it was making a 'jurisdictional' decision based on [47 U.S.C. §] 402").

The D.C. Circuit was plainly correct in concluding that the Second Circuit had left to the D.C. Circuit the adjudication of the merits of NextWave's claims under the Bankruptcy Code. The Second Circuit did not even cite § 525(a), much less purport to resolve any claim arising under that statute, which is not surprising since the bankruptcy court itself did not rule on NextWave's § 525(a) claim. Instead, the Second Circuit expressly refrained from applying the substantive provisions of the Bankruptcy Code to the license cancellation, and pointedly expressed no opinion on what the result of that application might be in the D.C. Circuit—the court that the Second Circuit identified as the only forum with jurisdiction to resolve the merits of NextWave's claims. *See* Pet. App. 131a-132a ("NextWave remains free to pursue its challenge to the FCC's regulatory acts" and "has filed protective notices of appeal in the D.C. Circuit"); *id.* at 103a ("We make no comment on the (precautionary) appeals filed by NextWave in the Court of Appeals for the District of Columbia Circuit."); *id.* at 127a ("[e]ven if the bankruptcy court is right on the merits of its arguments against revocation—we have no occasion to express an opinion . . ."). [6]

Petitioners' assertions are further contradicted by the Second Circuit's repeated emphasis that its holding was predicated on 28 U.S.C. § 2342 and 47 U.S.C. § 402, which confer exclusive jurisdiction to review FCC decisions on the courts of appeals (here, the D.C. Circuit). For example, the Second Circuit made clear that "[t]he bankruptcy court lacked jurisdiction to declare the [FCC's] Public Notice null and void on any ground: that the Public Notice violated the automatic stay, that the right to cure obviates any default, or that the government was estopped." Pet. App. 127a; *see also id.* at 128a-129a ("'[e]xclusive jurisdiction over review of

[6] In addition, petitioners' arguments fail even on their own terms, because they amount to nothing more than a highly case-specific challenge to the application of settled principles of res judicata and collateral estoppel in the particular circumstances of this case.

final FCC orders is vested in the Court of Appeals'") (citation omitted)); *id.* at 115a ("the bankruptcy court exceeded its statutory jurisdiction by engaging in such review"); *id.* at 129a ("Jurisdiction over all but a few FCC regulatory actions is restricted to the courts of appeals") (citing 47 U.S.C. § 402); *id.* at 129a ("'[J]urisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals'") (quoting 28 U.S.C. § 2342).

Under the Second Circuit's decision, the exclusive-jurisdiction provisions of 47 U.S.C. § 402 meant that the D.C. Circuit was the appropriate court to review final regulatory decisions of the FCC and apply the substantive provisions of the Bankruptcy Code to determine whether such decisions were contrary to law. *See* Pet. App. 131a. Thus, the judgment below fully comports with the Second Circuit's holding that only the D.C. Circuit, and not the bankruptcy court (or the Second Circuit) possessed jurisdiction to review the FCC's actions.

B. The judgment below does not conflict with the decisions of other circuits

Arctic Slope (but not the FCC or Verizon) argues that the judgment below conflicts with decisions of the First, Fifth, and Ninth Circuits that allegedly endorse a "narrow" reading of § 525(a)'s requirement that the prohibited license denial or revocation occur "solely because" the debtor files for bankruptcy or fails to pay a dischargeable debt. Arctic Pet. 18-20. This "narrow" reading purportedly conflicts with what Arctic Slope claims is the D.C. Circuit's holding "that Section 525 is violated any time the failure to pay a dischargeable debt is a 'but for' cause of a prohibited action against a debtor." Arctic Pet. 18.

Arctic Slope mischaracterizes the holding below. The D.C. Circuit did not adopt or apply a "but for" causation test. Rather, the D.C. Circuit found that the "failure to make payments was the 'sole' trigger of the license cancellation, *in the sense that the Commission looked to no other factor in determining whether NextWave should retain its licenses.*" Pet.

App. 45a (emphasis added). Thus, the court used the term "sole trigger" to indicate that non-payment was the *only* basis for the cancellation decision, not merely a but-for cause. Accordingly, the purported conflict alleged by Arctic Slope is not presented here.

Even apart from this mistaken characterization, there is no basis for Arctic Slope's claim of conflict. In *In re Exquisito Services, Inc.*, 823 F.2d 151 (5th Cir. 1987), the Fifth Circuit *affirmed* the bankruptcy court's factual finding of a § 525 violation where the debtor's Chapter 11 filing was the sole trigger for the failure to renew a contract option. The court adopted a literal interpretation of § 525(a) that "focused on the specific language of the section," 823 F.2d at 153, just as the D.C. Circuit did below.

Laracuente v. Chase Manhattan Bank, 891 F.2d 17 (1st Cir. 1989), and *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264 (9th Cir. 1990), both involved claims against private employers for adverse employment actions allegedly taken in violation of § 525(b), and thus cannot present any conflict with the D.C. Circuit's application of § 525(a). Moreover, in both of these cases the private employer possessed independent grounds for terminating or failing to hire the debtor, separate and apart from the debtor's bankruptcy filing. In *Laracuente*, the "discharge was not due solely to the bankruptcy petition," but instead "occurred as a result of the Bank's investigation of Laracuente's [fraudulent] participation in loans to family members and her husband['s] . . . employees." 891 F.2d at 23. In *Comeaux*, the evidence clearly established that the employer was not going to hire the debtor for non-bankruptcy reasons even before it learned of his Chapter 13 bankruptcy filing. *See* 915 F.2d at 1269. Thus, the bankruptcy filing was not the "sole" cause of the employer's failure to hire the debtor. *Id.*

In this case, by contrast, the sole criterion used by the FCC in revoking NextWave's licenses was the very factor expressly prohibited by § 525(a): NextWave's failure to pay a debt while in bankruptcy. *See* Pet. App. 45a. Thus, there is no circuit conflict, and review is not warranted.

II. The Question Presented Is Not Sufficiently Important To Warrant Review

Lacking any credible claim of a circuit conflict, petitioners expend considerable energy attempting to demonstrate that the decision below "radical[ly] alter[s]" and "seriously impair[s]" the FCC's authority to allocate spectrum and "thwarts" its ability to employ the auction mechanism. FCC Pet. 14-20; Verizon Pet. 16-19; Arctic Pet. 23-27. These assertions are meritless.

First, recent events dramatically undercut the sincerity of petitioners' expressions of concern about the decision below. As noted above, in November 2001 the Department of Justice and the FCC consented to a contingent settlement of this case that, *inter alia*, provided for the withdrawal of the pending petitions for certiorari upon the occurrence of specified events in the settlement approval process. Although the settlement agreement subsequently terminated, the fact that the FCC was more than willing to settle this litigation in a manner that left it subject to the D.C. Circuit's decision belies petitioners' dire predictions about the allegedly dramatic impact of the decision below.

The FCC's willingness to accept the decision below as part of a settlement was fully justified, because the simple truth is that the D.C. Circuit's § 525(a) holding has little if any future significance, either for the FCC or for other agencies, and the government will have no difficulty implementing auction schemes, notwithstanding the continued existence of the decision below. Indeed, the decision below is inextricably bound up with the FCC's now-abandoned installment-payment scheme, and has no prospective implications for the FCC's existing auction procedures. Moreover, in the unlikely event that the FCC were to reconsider its abandonment of installment payments, nothing in the D.C. Circuit's decision would prevent the FCC from enforcing licensing conditions separate from non-payment of installment debts without violating § 525(a). Thus, the consequences predicted

by petitioners are illusory, and this Court's review is not warranted.

A. The question presented is of narrow applicability and is unlikely to recur

Perhaps the most obvious reason why certiorari is unwarranted is the fact that several years before the D.C. Circuit's decision below, the FCC abandoned the unique installment-payment program that gave rise to the § 525(a) issue in this case. *See In re Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures*, 13 FCC Rcd. 374, ¶ 40 (1997) ("installment payments should not be offered in auctions"); *In re Amendment of Part I of the Commission's Rules-Competitive Bidding Procedures*, 15 FCC Rcd. 21,520, ¶ 55 (2000) (adhering to previous decision to reject installment payment program). As a result, the question presented will not arise with any frequency in the future.[7]

The § 525(a) issue decided below arose only because of the particular details of the FCC's now-rescinded installment-payment scheme, and cannot arise in the absence of those unique circumstances. The crucial factor underlying the judgment below was that the FCC attempted to cancel NextWave's licenses solely for nonpayment of installments due to the FCC during the bankruptcy proceeding. By eliminating installment payments, the FCC has, as a prospective matter, eliminated the factual predicate for the type of § 525(a) claim at issue here.

[7] Though the FCC itself chose to disavow installment payments long *before* the D.C. Circuit issued its decision (and indeed, long before the § 525(a) issue had even arisen in the proceedings below), petitioners imply that the D.C. Circuit has somehow nullified Congress's will because installment-payment plans were expressly suggested in § 309(j). As the FCC recognized in deciding to eliminate the installment program, however, Congress did not mandate the use of installment plans; nor did it purport to override other provisions of federal law that might make an installment-payment approach less than optimal for the FCC. Even if there were some tension between the precatory suggestion of § 309(j) and the unambiguous command of § 525(a), the latter would necessarily control. But as demonstrated *infra*, no such tension exists.

Indeed, the FCC has already said as much. When NextWave sought this Court's review of the Second Circuit's mandamus decision, the FCC expressly argued that certiorari was not warranted in view of the fact that "the FCC has eliminated its installment payment program and requires payment in full *before* the license issues." FCC Br. in Opp., *NextWave Pers. Communications, Inc. v. FCC*, No. 00-447, at 12 (filed Oct. 30, 2000). As the FCC observed at the time, "the likelihood that the precise issue presented by the petition . . . will recur is diminished" by the elimination of the installment program. *Id.* This Court denied certiorari in No. 00-447, and the same result is appropriate here.

Petitioners suggest that, even outside an installment-payment setting, a prospective licensee could evade its financial obligations to the FCC by exploiting the "delay between the close of an auction and the time that the bidder's payment becomes due." Arctic Pet. 24; *see also* FCC Pet. 19; Verizon Pet. 18. This concern is baseless. In the first place, it is exceedingly implausible that a company would or could expend the time, effort, and money required to be a high bidder at an FCC spectrum auction (including payment of a substantial up-front deposit) only then to execute the improbable bankruptcy scenario envisioned by petitioners.

Moreover, even this unlikely factual scenario would not lead to the result that petitioners posit. Under the FCC's auction procedures, licenses are granted only "upon the full and timely payment of winning bids." 47 C.F.R. § 1.2109(a) (2000); *see Competitive Bidding Proceeding*, 63 Fed. Reg. 2315, 2327, 2343 (1998). Before that transfer takes place, the agreement between the FCC and the high bidder constitutes an "executory contract" under 11 U.S.C. § 365. *See* H.R. REP. NO. 95-595, at 347 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6303 (executory contracts are "contracts on which performance remains due to some extent on both sides"). If the high bidder declared bankruptcy and then

chose to "assume" an executory contract in order to obtain its benefits (here, issuance of the licenses), it would be bound to perform all of its obligations under the "assumed" contract, including paying all amounts due. *See* 11 U.S.C. § 365(b)(1) (preventing assumption of executory contract under Bankruptcy Code without cure of default and adequate assurance of future performance).[8] If, on the other hand, the bidder chose to "reject" the executory contract, the FCC would have no obligation to perform its side of the contract by granting the licenses (and would remain free to seek appropriate penalties for the bidder's default). Either way, the FCC would not be required to transfer the licenses before receiving full payment.

Petitioners' concerns are misplaced for another reason: As the D.C. Circuit recognized, § 525(a) does not restrict or limit the FCC's ability to adopt and enforce regulatory conditions as it deems appropriate; the statute merely prevents adverse licensing decisions based solely on non-payment of a dischargeable debt. Pet. App. 50a. The FCC violated § 525(a) in this case because it made NextWave's non-payment the "sole trigger" for license cancellation. Pet. App. 45a. But § 525(a) is not implicated by licensing decisions that are based on factors other than non-payment of a dischargeable debt. *See* Pet. App. 46a, 50a. Accordingly, the FCC remains free to adopt prospective regulations making future licensing decisions depend on an *array* of factors; what it cannot do is what it did here, which is to make cancellation decisions based solely on non-payment of a dischargeable debt.

[8] If the high bidder were to default after affirmatively assuming the contract, § 525(a) would again provide no protection. The sums owed on account of a post-assumption default would constitute post-petition administrative expenses under 11 U.S.C. § 503, meaning they would receive priority (11 U.S.C. § 507(a)(1)), and would not be dischargeable. *See* 11 U.S.C. § 1129(a)(9)(A) (reorganization plan may not be confirmed without, *inter alia*, full payment of § 507(a)(1) claims). Because § 525(a) prohibits license denial for non-payment of a *dischargeable* debt, it would not be triggered by the nondischargeable debt arising from a post-assumption default.

Petitioners thus fail in their efforts to derive some continuing significance from the decision below. The FCC has abandoned the installment-payment scheme that gave rise to the question presented in this case, and as a result there is no likelihood that issues of this kind will arise in the future. Moreover, the FCC—or any other government agency contemplating an auction program—can easily ensure that its future licensing decisions do not violate § 525(a). Accordingly, the D.C. Circuit's decision does not pose any threat to legitimate regulatory objectives.

B. Review is inappropriate because alternative grounds justify the decision

Review is also unwarranted in this case because the ultimate judgment would be the same no matter how the question presented in the petitions is resolved. The D.C. Circuit held that, separate and apart from § 525(a), NextWave's licenses are also protected by the Bankruptcy Code's automatic stay, 11 U.S.C. § 362(a)(4)-(5). Pet. App. 40a-41a. The existence of this alternative ground for the decision below counsels strongly against the exercise of certiorari jurisdiction. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183-84 (1959); *Lawson v. Murray*, 515 U.S. 1110, 1116 (1995) (Scalia, J., concurring in denial of certiorari).

In this case, the D.C. Circuit squarely held that the automatic stay applies to protect NextWave's licenses, expressly rejecting the FCC's arguments that the attempt to revoke NextWave's licenses was "an action exempt from the automatic stay." Pet. App. 41a. The D.C. Circuit concluded that the FCC's license cancellation was an attempt to enforce its liens on the licenses through self-help repossession, a clear violation of the lien-enforcement provisions of the automatic stay contained in 11 U.S.C. § 362(a)(4)-(5). Pet. App. 40a-41a.

The FCC asserts that the D.C. Circuit's automatic-stay holding is not "an independent ground" for the decision, be-

cause it was "merely part of the . . . analysis of the Section 525 issue[.]" FCC Pet. 28 n.10. But the fact that the D.C. Circuit resolved the automatic-stay issue in the course of rejecting the FCC's arguments about § 525(a) does not change the binding quality of the court's automatic-stay holding. Actions taken in violation of the automatic stay are void. *In re 48th Street Steakhouse, Inc.*, 835 F.2d 427, 431 (2d Cir. 1987). Thus, the FCC's attempt to cancel NextWave's licenses was invalid wholly apart from § 525(a).

The FCC and Verizon argue in passing that the D.C. Circuit's automatic-stay holding is incorrect, asserting that spectrum licenses are not "'property of the estate'" and are therefore not protected by the automatic stay. FCC Pet. 28 n.10; *see also* Verizon Pet. 27 n.11. That argument is patently incorrect; the law is clear that FCC licenses are property of the estate for bankruptcy purposes. *See, e.g., In re GWI PCS 1, Inc.*, 230 F.3d 788, 803 n.29 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2623 (2001); *In re Cent. Ark. Broad. Co.*, 68 F.3d 213, 214-15 (8th Cir. 1995); *In re Tak Communications, Inc.*, 985 F.2d 916, 918 (7th Cir. 1993); *In re Fugazy Express, Inc.*, 124 B.R. 426, 430 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992); *see generally United States v. Whiting Pools*, 462 U.S. 198, 204-05 (1983) ("property of the estate" is construed broadly). Indeed, the FCC itself obviously concluded that NextWave has a *property* interest in the licenses, because it used that interest as collateral. *See* Pet. App. 402a-403a.

Despite the fact that it filed UCC financing statements to protect its security interests in NextWave's licenses, and despite its prior admission that canceling the licenses would be "'tantamount . . . to foreclosing on collateral,'" Pet. App. 41a, the FCC now contends that the license cancellation "was not an effort to enforce a lien" because it was done pursuant to a "regulatory requirement." FCC Pet. 28 n.10. That reasoning incorrectly assumes that there is a regulatory exception to § 362(a)(4)-(5). The Bankruptcy Code contains a regulatory exception to certain aspects of the automatic stay (*see* 11 U.S.C. § 362(b)(4)), but that exception specifically

does not apply to the lien-enforcement provisions in subsections (a)(4) and (5). Petitioners' argument thus violates the cardinal rule that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied . . . ." *TRW Inc. v. Andrews*, 122 S. Ct. 441, 447 (2001) (internal quotation marks omitted). In addition, the FCC cannot plausibly claim that its allegedly "regulatory" action was dissociated from its liens, because the very regulation at issue expressly linked automatic license cancellation with "*debt collection* procedures." 47 C.F.R. § 1.2110(f)(4)(iv) (1998) (emphasis added) (Pet. App. 495a); *see also* 47 C.F.R. § 1.2110(e)(4)(iii) (1997) (Pet. App. 480a).

The result reached below is also supported by additional alternative grounds not resolved by the D.C. Circuit and not challenged in the petitions. For example, the automatic cancellation violated NextWave's due process right to fair notice, because NextWave lacked "ascertainable certainty" that the FCC would cancel its licenses for non-payment even while NextWave was a debtor in bankruptcy. *See Trinity Broad. of Florida, Inc. v. FCC*, 211 F.3d 618, 619, 628 (D.C. Cir. 2000). Although the D.C. Circuit did not resolve NextWave's fair-notice claim under *Trinity*, the court expressly held that "it was unclear prior to the [January 12, 2000] notice of re-auction that the automatic cancellation policy would apply to licensees who had filed for bankruptcy." Pet. App. 21a. Indeed, the FCC's "own conduct suggests that it was at best unsure whether the automatic stay blocked cancellation of the company's licenses" (*id.*), and the FCC's statements gave NextWave ample reason to believe that its licenses were protected: "[I]n the bankruptcy court, Commission counsel suggested that the automatic stay blocked cancellation of NextWave's licenses, stating for example that although '[t]he regulations provide that upon failure to make the payments the license is automatically canceled[,] . . . [t]hat hasn't [happened] in this case due to the automatic stay.'" *Id.* at 21a-22a (citation omitted). The D.C.

Circuit's findings in this regard would plainly support NextWave's fair-notice claim under *Trinity* as well.[9]

The FCC would have to prevail on each alternative ground in order to succeed in canceling NextWave's licenses. This demonstrates that—contrary to petitioners' suggestions—the amount of money allegedly at stake in this case does not justify review.[10] This case cannot be resolved in favor of the government on these petitions; and, even if petitioners were somehow to prevail in this Court on their § 525(a) arguments, NextWave's remaining claims would necessitate further lengthy judicial proceedings and would prevent petitioners from achieving any final success on remand. For these reasons as well, certiorari is not warranted.

C. This Court has already denied certiorari in a "closely related" case that had a far greater impact on the FCC's auction program

This Court recently denied certiorari in *In re GWI PCS 1, Inc.*, 230 F.3d 788 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2623 (2001). Petitioners' silence about that event is remarkable, because the similarities between that case and this one are plain. The *GWI* case concerned a C-Block licensee that was a high bidder at the very same auction as NextWave, subject to the same installment-payment rules. Under the Bankruptcy Code, GWI avoided full payment on its licenses but was permitted (over the FCC's objections) to retain them. The connection between the cases is so clear that, one week before the denial of certiorari in *GWI*, the petition in that case was relisted for conference after the Acting Solicitor General informed this Court of the D.C. Circuit's *NextWave* decision. He stated that *NextWave* "addresses legal questions closely related to those raised in [the *GWI*] certiorari petition." Letter from Paul D. Clement, Acting Solicitor General, to William K. Suter, Clerk, No. 00-1621 (filed June 22, 2001).

Significantly, the FCC's petition in *GWI* described the alleged impact of that decision on the FCC's auction scheme in dire terms even more extreme than those employed here. *See* Pet. for Cert., *United States v. GWI PCS 1, Inc.*, No. 00-1621 at 14 (filed Apr. 23, 2001) (Fifth Circuit's "decision undermines and distorts the increasingly-important market-based system of license allocation"); *id.* at 16 (court "usurped the FCC's exclusive regulatory function"); *id.* at 17 ("The Fifth Circuit effectively transferred the FCC's congressionally granted regulatory authority over spectrum licensing to the bankruptcy court . . . ."); *id.* at 20 (decision "threatens ongoing distortion of the FCC's auction process" and "might encourage speculative bidding in future auctions").

If any case posed a threat to the FCC's auction process, it would have been *GWI*, since it allowed a debtor to keep its licenses without making full payment to the FCC. By contrast, the D.C. Circuit's holding in this case does not threaten the FCC's existing regulatory scheme in any way, and does not affect NextWave's obligation to pay the FCC in full—an obligation that NextWave's proposed plan of reorganization would fully satisfy. Nor would the decision below pose a significant obstacle even in the unlikely event that the FCC decided to reinstate an installment-payment option.

---

[9] Another alternative ground not addressed by the D.C. Circuit was NextWave's right to cure defaults. Debtors in Chapter 11 are permitted to provide in their reorganization plans for the "cur[e]" of "any default," "[n]otwithstanding any otherwise applicable nonbankruptcy law." 11 U.S.C. § 1123(a), (a)(5)(G). To cancel NextWave's licenses without allowing it to cure its payment default would violate that important right. In addition, the D.C. Circuit also left unresolved NextWave's claims of waiver and estoppel.

[10] This Court often denies review in cases involving large sums of money. *See, e.g., United States v. GWI PCS 1, Inc.*, 121 S. Ct. 2623 (2001) (denying certiorari despite government's claim that it was deprived of billions of dollars of potential revenue); *Exxon Mobil Corp. v. Baker*, 531 U.S. 919 (2000) (denying certiorari in case concerning validity of $5 billion punitive damages award). The only case petitioners cite on this point, *United States v. Mitchell*, 463 U.S. 206 (1983), was obviously certworthy regardless of the amount of damages, because the Court was able to "resolve . . . confusion" about important questions of recurring national importance. *Id.* at 212, 225-28.

In addition, in *GWI* the Fifth Circuit expressly "disagree[d] with the Second Circuit's conclusion" in this case regarding the timing of high bidders' financial obligations to the FCC. 230 F.3d at 808. Thus, the *GWI* case involved an actual circuit conflict, in marked contrast with the D.C. Circuit's decision here. That this Court nonetheless denied certiorari in *GWI* further confirms the absence of any basis for review here.

III. The Judgment Below Is Clearly Correct

Petitioners also assert that the opinion below reflects an erroneous interpretation of § 525(a). Even if true, of course, that assertion would not justify this Court's review. *See, e.g.*, *Ross v. Moffit*, 417 U.S. 600, 616-17 (1974). Correctness review is particularly inappropriate in a case like this one, where the question presented is unlikely to recur.

In any event, the D.C. Circuit correctly interpreted and applied § 525(a). The language of the statute is clear and unambiguous: "a governmental unit may not . . . revoke" a debtor's license "solely because" the debtor "has not paid a debt that is dischargeable" in bankruptcy. Under the plain language of this statute, the FCC's automatic revocation of NextWave's licenses for failure to make a dischargeable installment payment was unlawful.

Notwithstanding this commonsense and self-evident conclusion compelled by the unambiguous text of § 525(a), petitioners argue that the D.C. Circuit's application of § 525(a) in the particular factual setting of this case is erroneous. Petitioners' assertions are meritless.

A. The FCC's attempted "automatic" license revocation occurred "solely because" NextWave failed to pay its debt

The D.C. Circuit correctly found that the FCC's attempted revocation occurred "solely because" of NextWave's failure to pay a dischargeable debt: "NextWave's failure to make its payments was . . . the 'sole' trigger of the license cancellation, in the sense that the Commission looked to no

other factor in determining whether NextWave should retain its licenses." Pet. App. 45a. Petitioners contend that this finding was erroneous, because the requirement of full and timely payment had implications regarding a licensee's fitness to hold a license, and not merely a monetary purpose. FCC Pet. 24.

This argument is patently incorrect. Every licensing decision made by a government agency will, by definition, have a "regulatory" purpose. If the mere existence of a regulatory nexus were sufficient to defeat the protections of § 525(a), those protections would be nugatory. Under the plain text of the statute, however, the dispositive question is not whether the agency had a regulatory purpose for its action, but rather whether the action was based solely on non-payment of a dischargeable debt.

Here, the FCC looked to one factor and one factor only in revoking the licenses: NextWave's non-payment of a debt. *See* Pet. App. 72a-73a, 96a-97a; C.A. App. 452-55. Indeed, the FCC has repeatedly asserted that the cancellation was "automatic"—without thought or reflection—based solely on NextWave's failure to make installment payments. *Id.* As the D.C. Circuit correctly found, the FCC made no effort whatsoever to consider any "extrinsic evidence of fitness to hold a license," and instead "allow[ed] license cancellation to rest solely on failure to pay a dischargeable debt." Pet. App. 47a. The FCC may have had various reasons for employing non-payment as the only factor in this cancellation decision, but the crucial fact is that non-payment was the sole, exclusive, and automatic basis for the FCC's action—in patent violation of § 525(a).[11]

---

[11] Nor does the legislative history support petitioners' arguments. To the contrary, as the D.C. Circuit correctly recognized, the legislative history confirms that "[t]he purpose of [§ 525] is to prevent an *automatic reaction* against an individual for availing himself of the protection of the bankruptcy laws." H.R. REP. NO. 95-595, at 165 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6126 (emphasis added); *see* Pet. App. 46a.

Petitioners' argument would render § 525(a) a dead letter. By its terms, § 525(a) is aimed exclusively at *government* action. Under petitioners' interpretation, however, whenever a governmental agency incorporates payment obligations into its regulations and proffers a "regulatory purpose" for doing so, § 525(a) would be inapplicable, and the agency could then proceed to revoke debtors' licenses based on nothing other than non-payment. The FCC cites no authority for that absurd proposition, which would allow agencies to eviscerate § 525(a) by the simple artifice of issuing regulations mandating timely payment of all debts. The plain language of the statute precludes that result, because it forbids *all* efforts to cancel licenses solely because of non-payment, regardless of the source of, or perceived regulatory justifications for, the underlying payment obligation. Section 525(a) was adopted in furtherance of the Bankruptcy Code's overarching goal of providing financially distressed companies with breathing room to be rehabilitated in a manner that preserves assets and ongoing businesses so that creditors may be paid. *See* S. REP. NO. 75-989, at 81 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5867 (purpose of § 525 is to allow distressed company a "fresh start" and opportunity to move forward without regard to status as a debtor or failure to pay a debt dischargeable in bankruptcy); *see also* 4 COLLIER ON BANKRUPTCY ¶ 525.02 at 525-4 (15th ed. rev. 2001).

Unsurprisingly, courts uniformly hold that § 525(a) is applicable even where the underlying payment obligation purportedly serves regulatory interests as well. *See In re Walker*, 927 F.2d 1138, 1142-43 (10th Cir. 1991) (§ 525(a) precludes "automatic revocation" of licenses for non-payment of statutorily-mandated obligation); *In re Williams*, 158 B.R. 493, 495-96 (Bankr. D. Idaho 1993) (§ 525 violated by automatic suspension of license even where government agency is acting "to enforce [its] regulatory power"); *In re Bill*, 90 B.R. 651, 657-59 (Bankr. D.N.J. 1988) (§ 525 applies despite important "public policy concerns reflected in the [regulatory] surcharges"). Petitioners cite no cases to the contrary, nor could they.

B. NextWave's debt is "dischargeable" within the meaning of § 525(a)

The FCC also argues that NextWave's payment obligations are not dischargeable debts within the meaning of § 525(a) because they are "express regulatory conditions." FCC Pet. 22. This is simply incorrect. The missed installment payments that triggered cancellation of NextWave's licenses constitute monetary obligations due to the FCC; they are evidenced by promissory notes and secured by UCC financing statements, and thus clearly qualify as "debts." *See* 11 U.S.C. § 101(12) (defining "debt" as any liability on a claim), 101(5) (defining "claim" broadly to encompass every kind of "right to payment").

Contrary to the FCC's assertions, moreover, the fact that the FCC's regulations required licensees to pay their debts to the FCC does not render such debts non-dischargeable. Under the Bankruptcy Code, "any debt" is dischargeable unless it falls within a statutory exception to discharge. *See* 11 U.S.C. §§ 523, 1141(d)(1)(A). There is no "regulatory" or other exception to discharge applicable to NextWave's debts. The FCC does not even attempt to dispute this point, nor could it.

At bottom, the FCC's non-dischargeability argument reduces to the proposition that § 525(a) should be deemed inapplicable whenever an agency chooses to promulgate a regulation making payment of debts a regulatory condition of licensure. This assertion contradicts the statute's plain text and finds no support in case law, legislative history, or common sense. By its very nature, § 525(a) is aimed at prohibiting specific regulatory action. Allowing agencies to exempt their actions from § 525(a) merely by issuing regulations would nullify the statute. As the D.C. Circuit correctly recognized (and as the FCC acknowledged below), this argument "amounts to a request for a regulatory purpose excep-

tion to section 525," an exception that Congress clearly chose not to create. Pet. App. 43a-44a.[12]

Moreover, the FCC's dischargeability argument is predicated on an erroneous reading of the Second Circuit's December 1999 opinion. According to the FCC, the Second Circuit "held" in that opinion that "[s]o long as [NextWave] held the licenses" its debts "were not 'dischargeable' in bankruptcy." FCC Pet. 22. The FCC is mistaken; the reader will search the Second Circuit's opinion in vain for any discussion of the question whether NextWave's debts were dischargeable in bankruptcy. Indeed, no such question was even presented in that appeal. As noted above, the Bankruptcy Code itself provides for the dischargeability of "any debt." 11 U.S.C. § 1141(d)(1)(A). In this instance, NextWave's debt to the FCC is "dischargeable" within the meaning of § 525(a) because it is precisely the type of obligation that is subject to discharge under § 1141. Under the Administrative Procedure Act, the D.C. Circuit clearly possessed the authority to determine whether the FCC's cancellation of NextWave's licenses was contrary to law, including § 525(a)'s prohibition against the cancellation of a license for non-payment of a dischargeable debt. Pet. App. 16a-18a, 36a-37a. Accordingly, the FCC's argument is entirely baseless.[13]

---

[12] When Congress desires to create specific exceptions for governmental agencies under particular provisions of the Bankruptcy Code, it does so expressly. *See, e.g.*, 11 U.S.C. § 525(a) (exempting certain Department of Agriculture actions).

[13] For the first time in this case, Verizon now suggests that NextWave's debts are not dischargeable because the "relation" between NextWave and the FCC remains executory and therefore constitutes an "executory contract" that does not give rise to a dischargeable debt under the Code. *See* Verizon Pet. 27-29. This argument is incorrect, because the transaction giving rise to NextWave's debt is not executory in nature. The FCC's obligation—namely, issuance of the licenses to NextWave—was performed in 1997. Only payment of the debt by NextWave remains, and thus performance is due on one side only, precluding characterization as an executory contract. Moreover, Verizon's argument has been waived, because it was neither pressed nor passed upon below. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976).

C. Nothing in the Communications Act or the Bankruptcy Code allows the FCC to trump § 525(a)

Petitioners also argue that the D.C. Circuit's § 525(a) holding is "at odds with the structure of the Bankruptcy Code" (FCC Pet. 25), or "creates disharmony with other aspects of the Code." Verizon Pet. 26. This argument rests on the vague assertion that "[t]he Bankruptcy Code generally exempts regulatory action from the Code's provisions." FCC Pet. 25; *see also* Verizon Pet. 26. The only evidence that petitioners offer for such a "general" exemption is 11 U.S.C. § 362(b)(4), but the plain language and structure of the Bankruptcy Code preclude petitioners' argument.

By its own terms, § 362(b)(4) operates as an exception to only *a few specified subsections* of § 362(a)'s automatic stay. There is no basis for expanding that carefully crafted exception beyond its terms. *See TRW Inc. v. Andrews*, 122 S. Ct. at 447. Fashioning an implied regulatory exception to § 525(a) would be particularly inappropriate, because the prohibitions set forth in that provision are aimed *exclusively* at "governmental unit[s]," and thus by definition protect *only* against specific regulatory action. Indeed, Congress expressly waived sovereign immunity with respect to claims under § 525. *See* 11 U.S.C. § 106. Moreover, § 525(a) expressly exempts some regulatory actions from its scope. *See* 11 U.S.C. § 525(a) (exempting certain actions by the Department of Agriculture). As the D.C. Circuit explained, Congress's decision to exempt another agency (but not the FCC) from the scope of § 525(a) convincingly demonstrates that Congress intended no exemption for the FCC. *See* Pet. App. 43a-44a.

Nor is there any provision in the Communications Act that overcomes the clear applicability of § 525(a). The FCC argues that the Act does not permit the FCC's adoption of

competitive bidding to diminish the FCC's authority. FCC Pet. 26 (citing 47 U.S.C. § 309(j)(6)(C)). But that assertion is irrelevant, because the advent of competitive bidding did not alter the applicability of § 525(a). Both before and after the FCC's adoption of competitive bidding, the FCC was subject to the requirements of § 525(a) in those circumstances where it applies. Moreover, as demonstrated above, the FCC can readily ensure that its auction program and licensing decisions do not violate § 525(a). There is thus no no basis for the FCC's attempt to evade the express requirements of that statute.

CONCLUSION

In the decision below, the D.C. Circuit did precisely what the Second Circuit contemplated that it would: It decided the merits of NextWave's challenge to the FCC's attempted cancellation of NextWave's licenses. The D.C. Circuit's well-reasoned decision follows directly from the plain language of § 525(a), does not conflict with the decisions of any other court, and is supported by multiple alternative grounds. The D.C. Circuit applied § 525(a) in precisely the manner for which it was intended, allowing NextWave an opportunity to rehabilitate itself and submit a plan of reorganization that would both pay creditors in full and complete the commercialization of NextWave's licenses. Moreover, the question presented in the petitions is unlikely to recur, because the FCC's abandonment of the installment-payment program has deprived this issue of any future significance. For all these reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
IAN HEATH GERSHENGORN
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

G. ERIC BRUNSTAD, JR.
BINGHAM DANA LLP
One State Street
Hartford, Connecticut 06103
(860) 240-2700

THOMAS G. HUNGAR
Counsel of Record
DOUGLAS R. COX
MARK E. PAPADOPOULOS
CURTIS E. GANNON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

DEBORAH L. SCHRIER-RAPE
SCHRIER-RAPE, P.C.
5929 Westgrove Drive
Dallas, Texas 75248
(972) 818-6761

Counsel for Respondents

February 1, 2002

APPENDIX

TABLE OF CONTENTS
FOR RESPONDENTS' APPENDIX

Appendix A (Opposition by the Federal Communications Commission to NextWave's Motion for a Stay Pending Judicial Review or for Expedited Consideration (D.C. Cir. filed Oct. 6, 2000)) 1a

Appendix B (Opposition of the Cellular Telecommunications Industry Association, et al. to NextWave's Motion for a Stay Pending Judicial Review (D.C. Cir. filed Oct. 6, 2000)) 3a

Appendix C (Order of the D.C. Circuit Denying FCC's Motion to Stay Mandate (D.C. Cir. Aug. 23, 2001)) 6a

Appendix D (Statement of FCC Chairman Michael Powell on Conclusion of Discussions on NextWave Licenses (Nov. 16, 2001)) 8a

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-1402; 00-1403

NEXTWAVE PERSONAL COMMUNICATIONS, INC., *ET AL.*,
Appellants/Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Appellees/Respondents

[Filed: October 6, 2000]

OPPOSITION BY THE FEDERAL COMMUNICATIONS COMMISSION TO NEXTWAVE'S MOTION FOR A STAY PENDING JUDICIAL REVIEW OR FOR EXPEDITED CONSIDERATION

The Federal Communications Commission ("FCC" or "Commission") hereby opposes NextWave's request for a stay of the scheduled auction on December 12, 2000. NextWave has failed to satisfy the requirements for obtaining a stay; most fundamentally, the requirement that it show irreparable harm to it resulting from the auction. No harm will befall NextWave, because the Commission has expressly conditioned the results of the auction on the outcome of this case. Should NextWave prevail it will get its licenses back.

* * *

II. ARGUMENT

* * *

[page 9]

Here the auction NextWave seeks to enjoin is the auction of the spectrum previously licensed to it. Yet NextWave has failed to demonstrate any harm to it, irreparable or otherwise, that will result from the conduct of that auction. As NextWave undoubtedly knows, but fails to mention anywhere in its stay papers, the Commission has informed auction participants that the auction will be conducted subject to pending litigation.[26] This means that, notwithstanding the auction, if NextWave prevails before this Court it will get its licenses back. Therefore, the Commission has ensured that "corrective relief will be available at a later date," if such relief is ultimately appropriate. Wisconsin Gas Co. [v. FERC], 758 F.2d [669,] 674 [D.C. Cir. 1985)], quoting Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

In view of this reservation of rights, of which all auction participants will be on notice, NextWave cannot demonstrate any harm to it whatsoever from the Commission's conduct of the auction on the scheduled date.

* * *

---

[26] See C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000 Rescheduled for December 12, 2000, Public Notice, DA 00-2038 at 5-6 (rel. Sept. 6, 2000): "Potential bidders and interested parties should be aware that . . . certain judicial proceedings that may relate to the licenses available in Auction No. 35 are pending. . . the auction is subject to such matters. . . . This Public Notice clarifies that the Commission will return the payments made by winning bidders of licenses in Auction No. 35 in the event that such bidders are subsequently required to surrender licenses won to prior applicants or license holders as a result of final determinations reached in pending proceedings."

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case Nos. 00-1402; 00-1403

NEXTWAVE PERSONAL COMMUNICATIONS INC.
And NEXTWAVE POWER PARTNERS INC.
Appellants/Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
And the UNITED STATES OF AMERICA,
Appellees/Respondents.

[Filed: October 6, 2000]

OPPOSITION OF THE CELLULAR TELECOMMNICATIONS INDUSTRY ASSOCIATION, ET AL. TO NEXTWAVE'S MOTION FOR A STAY PENDING JUDICIAL REVIEW

The Cellular Telecommunications Industry Association ("CTIA"), AT&T Wireless Services, Inc., BellSouth Corporation and BellSouth Cellular Corp., Cellco Partnership, d/b/a Verizon Wireless, Dobson Communications Corporation, Nextel Communications, Inc., Sprint Spectrum L.P., d/b/a Sprint PCS, TeleCorp PCS, Inc., and VoiceStream Wireless Corporation (collectively referred to as "the Industry Group")[1] hereby respond to NextWave's motion for a stay

---

[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers. The other wire-

pending judicial review ("motion"),[2] filed September 26, 2000. The Industry Group opposes NextWave's stay request.

[page 2]

* * * The Federal Communications Commission ("FCC" or "Commission") has expressly conditioned the upcoming reauction of the former NextWave licenses (scheduled December 12, 2000) on the outcome of the NextWave litigation and winning bidders will have their bid amounts refunded if NextWave's licenses are reinstated.

* * *

I. THE DENIAL OF A STAY WILL CAUSE NEXTWAVE NO IRREPARABLE HARM

* * *

[page 7]

Third, and equally important, NextWave's licensing interests will not be harmed absent a stay because the reauction is conditioned upon the outcome of NextWave's litigation. It is no coincidence that NextWave fails to raise any harm flowing from the reauction. NextWave's

[page 8]

potential rights to its canceled licenses have been fully protected by the FCC. With regard to the upcoming reauction of its former licenses, the Commission has notified potential bidders that the outcome is subject to the litigation:

> [C]ertain judicial proceedings that may relate to the licenses available in Auction No. 35 are pending or may be subject to further review. Resolution of these matters could have an effect on the availability of spectrum included in Auction No. 35 *and the auction is subject to such matters* . . . .[18]

---

less carriers listed above are members of CTIA and are interested in participating in the upcoming reauction.

[2] NextWave filed under the names NextWave Personal Communications Inc. and NextWave Power Partners Inc.

[18] "C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000, Rescheduled for December 12, 2000," *Public Notice*, Report No. AUC-00-35-C (Auction No. 35),

* * *

DA-00-2038 (rel. Sept. 6, 2000) at 6 (emphasis added) (*September 6 Public Notice*); *accord* Public Notice, DA 00-2259 (rel. Oct. 5, 2000) at 6. The FCC has also indicated that if licenses have to be returned, the money bid will be refunded.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1402 September Term, 2000

NextWave Personal Communications Inc. and NextWave Power Partners, Inc., Petitioners
v.
Federal Communications Commission and United States of America, Respondents

BellSouth Corporation, et al., Intervenors

Consolidated with 00-1403

[Decided: August 23, 2001]

BEFORE: Sentelle, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of respondents' motion to stay issuance of the mandate, the opposition thereto, and the reply, it is

ORDERED that the motion be denied. In order to obtain a stay of the mandate pending a petition for writ of certiorari, the Federal Communication Commission (FCC) must show that the "petition would present a substantial question and that there is good cause for a stay." See Fed. R. App. P. 41(d)(2)(A); D.C. Cir. Rule 41(a)(2) (movant for stay of mandate must provide "facts showing good cause for the relief sought"). The FCC has not demonstrated that the petition would present a substantial question. Furthermore, in light of petitioners' stipulation that they will make the effectiveness of their plan of reorganization contingent upon a final decision from the Supreme Court on the issues to be raised in the FCC's petition for writ of certiorari, the FCC

cannot demonstrate that any substantial harm would result from the continuation of the bankruptcy proceedings during the limited pendency of the certiorari petition. See, e.g., Books v. City of Elkhart, 239 F.3d 826 (7th Cir.) (Ripple, J., in chambers) (stay "inquiry must focus on whether the applicant has a reasonable probability of succeeding on the merits and whether the applicant will suffer irreparable injury"), cert. denied, 121 S. Ct. 2209 (2001).

The Clerk is directed to issue the mandate seven days from the date of this order. See Fed. R. App. P. 41(b).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX D

[seal omitted]

NEWS

Federal Communications
Commission
445 12th Street, S.W.
Washington, D.C. 20554

News media information
202 / 418-0500
Internet: http://www.fcc.gov
TTY: 1-888-835-5322

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC. 515 F 2d 385 (D.C. Circ 1974).

FOR IMMEDIATE RELEASE
November 16, 2001

Contact: David Fiske (202) 418-0513
Brian Marriott (202) 418-7121
Maureen Peratino (202) 418-0506

STATEMENT OF FCC CHAIRMAN MICHAEL POWELL ON CONCLUSION OF DISCUSSIONS ON NEXTWAVE LICENSES

I am pleased to announce that discussions have concluded between the government, the auction 35 winners and Nextwave. Under the terms of the agreement: (1) Nextwave will surrender all the C and F block licenses it had previously won; (2) the wireless carriers that won these licenses in the Auction 35 reauction will receive them and be able to put them into use for the public shortly; and (3) the American taxpayer will receive $10 billion, more than twice the amount than would have been received had Nextwave kept the licenses in accordance with recent court rulings.

* * *

Before the agreement is effective, it must be ratified by the Department of Justice, which we expect. In addition, Congressional action will be required to implement the settlement. It is only right that the Congress have an opportu-

nity to pass on the terms and render its judgment as to the benefits for American consumers.

* * *

Supreme Court, U.S.
FILED
FEB 13 2002
CLERK

No. 01-653

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC. AND NEXTWAVE POWER PARTNERS INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

Cases:	Page
Curry v. *Metropolitan Dade County*, 148 B.R. 966 (S.D. Fla. 1992)	4
Fenix Cattle Co. v. *Silver*, 625 F.2d 290 (9th Cir. 1980)	4
GWI PCS 1, Inc., In re, 230 F.3d 788 (5th Cir. 2000), cert. denied, 121 S. Ct. 2623 (2001)	9
Stoltz v. *Brattleboro Hous. Auth.*, 259 B.R. 255 (D. Vt. 2000)	4
Statutes, regulation and rule:	
Bankruptcy Code, 11 U.S.C. 101 *et seq.*:	
Ch. 3, 11 U.S.C. 301 *et seq.*:	
11 U.S.C. 362	7
11 U.S.C. 362(a)(4)-(5)	7
11 U.S.C. 362(b)	8
Ch. 5, 11 U.S.C. 501 *et seq.*:	
11 U.S.C. 525(a)	2, 4, 6, 7, 8, 9, 10
Ch. 11, 11 U.S.C. 1101 *et seq.*:	
11 U.S.C. 1141(d)(1)	7
28 U.S.C. 1334(a)	7
Communication Act, 47 U.S.C. 151 *et seq.*:	
47 U.S.C. 309(j)	1, 2, 10
47 U.S.C. 309(j)(3)(B)	2
47 U.S.C. 309(j)(4)	2
47 U.S.C. 309(j)(6)(C)	10
47 C.F.R. 1.2110(e)(4) (1997)	9
Fed. R. Evid. 408	5
Miscellaneous:	
Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, In re:	
13 FCC Rcd 8345 (1998)	5
13 FCC Rcd 15,743 (1998)	3

Miscellaneous—Continued: Page

14 FCC Rcd 1817 (1998) 6
H.R. Rep. No. 111, 103d Cong., 1st Sess. (1993) 5
Letter from Attorney General John Ashcroft to Hon. Richard B. Cheney (Nov. 28, 2001) 5
Letter from Sen. John McCain to Sen. Tom Daschle and Sen. Trent Lott (Oct. 26, 2001) 6
Statement of FCC Chairman Michael K. Powell, Before the Subcomm. on Telecomm. and the Internet of the House Comm. on Energy and Comm. on the NextWave Settlement Legislation (Dec. 11, 2001) 5

REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

Respondents' brief in opposition fails to come to grips with the critical issue in this case—whether the assignment and regulation of radio spectrum licenses will be governed by communications law and the federal agency to which Congress assigned that responsibility, or by federal courts employing bankruptcy rules and policies designed to regulate debtor-creditor relationships. The Second Circuit correctly concluded that communications law should govern the fundamentally regulatory issue of spectrum license allocation. By contrast, in the decision below, the D.C. Circuit held that bankruptcy law precludes the FCC from enforcing regulatory license conditions. In so doing, the D.C. Circuit inappropriately injected the Bankruptcy Code into the heart of spectrum allocation decisions and, contrary to the Second Circuit, effectively awarded to respondents licenses valued at over $15 billion, despite the FCC's judgment that doing so would disserve the public interest. That erroneous decision clearly warrants further review.

1. By enacting 47 U.S.C. 309(j), Congress required the FCC to employ a market-based system of spectrum allocation—auctions—so that scarce radio spectrum would be licensed to the applicant best able to use it effectively and efficiently in the public interest, as demonstrated by the applicant's willingness and ability to pay more for it than others. As the Second Circuit recognized, that auction mechanism can achieve the goal of "fair and efficient allocation of spectrum licenses * * * *only if* the bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license," *i.e.*, "*only if* the high bid entails the obligation *to make good* the amount bid." Pet. App. 246a (emphases added). For that reason, the Second Circuit concluded that respondents' failure to meet their bid obligations had "more than financial implications." *Id.* at 234a. "It indicated that under the predictive mechanism created by Congress to guide the FCC," respondents were

"not the applicant[s] most likely to use the [l]icenses efficiently for the benefit of the public." *Ibid.*

Neither the D.C. Circuit nor respondents dispute the Second Circuit's conclusion that the payment condition of respondents' licenses is regulatory in nature. Nonetheless, the D.C. Circuit held that Section 525(a) of the Bankruptcy Code bars the FCC from enforcing that condition. That holding threatens to render the most important consideration in licensee selection—the applicants' willingness to pay more than others for the licenses—the least enforceable. See Pet. 16-20. In addition, by holding that the FCC cannot cancel licenses for nonpayment of winning bids, the decision below prevents the FCC from using installment payments without leaving "its regulatory actions open to attack under Chapter 11 of the Bankruptcy Code." Pet. App. 49a. In enacting Section 309(j), however, Congress specifically endorsed "installment payments" as a method of "promoting economic opportunity and competition," encouraging participation by smaller and disadvantaged entities, and "avoiding excessive concentration of licenses." 47 U.S.C. 309(j)(4) and (j)(3)(B). The D.C. Circuit's decision takes that congressionally sanctioned tool away from the Commission. Pet. 18.

The effect of the D.C. Circuit's decision has already been substantial. Dozens of licensees that acquired spectrum through the auction process have filed for bankruptcy protection and now regularly invoke the decision below to retain their licenses despite failing to meet regulatory payment obligations.[1] For example, 29 related entities in California recently filed an adversary proceeding in their Chapter 11 cases after failing to make installment payments on licenses valued at about $10 million. *In-Sync Interactive/Monterey, Inc.* v. *FCC*, No. LA 01-42617-ES (Bankr. C.D. Cal. Dec. 10, 2001). Relying on the D.C. Circuit's decision, the amended complaint (at ¶ 45) contends that Section 525 "prevents the termination of [the] licenses." The D.C. Circuit's decision

[1] We are advised that, to date, the holders of 337 licenses, with payment obligations of $6.9 billion, have declared bankruptcy.

also has been invoked in a Tenth Circuit case concerning the FCC's cancellation of another bankrupt bidder's C-Block licenses. See, *e.g.*, Appellant's Reply Br. at 8-11, *United States* v. *Kansas Pers. Comm. Servs., Ltd.*, No. 01-3042 (argued Jan. 17, 2002). Absent further review, the D.C. Circuit's decision *in this case alone* will require the FCC to award respondents licenses valued at over $15 billion, even though respondents demonstrated their inability or unwillingness to pay—and insisted initially that they should pay no more than one quarter of—the $4.7 billion they bid at auction. Respondents' stated willingness and ability to pay, of course, was the principal reason for awarding them the licenses over other applicants. See Pet. 7-8, 16.

After twice seeking this Court's review of earlier decisions in this controversy, respondents now insist that the question presented lacks importance because the Commission no longer provides for installment payments in license auctions. Br. in Opp. 16. But it is self-evident that a decision creating a massive loophole in a regulatory regime is more important than one keeping it shut. The issue is already arising with increasing frequency, as others rush to take advantage of the decision below. See pp. 2-3, *supra*. Moreover, the Commission suspended its use of installment payments precisely because of the delay and uncertainty created by bankruptcy litigation. As the Commission explained, its change in policy was prompted by the harm to the public interest that results "when licenses are held in abeyance in bankruptcy court." *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 13 FCC Rcd 15,743, ¶ 50 (1998); Pet. 19 n.5. In this case, for example, respondents have held some of the most valuable spectrum in the nation for five years, but have spent most of that time restructuring in bankruptcy. As a result, they have yet to provide service to a single customer.[2]

[2] Refusing to accept responsibility for their default, respondents suggest that the *Commission* caused their bankruptcy by "flooding the spectrum market" with licenses after respondents submitted their bids. Br. in

The effect of the decision below, in any event, is not necessarily limited to installment payments. Section 525 declares not only that an agency cannot "revoke" or "suspend" a license solely for nonpayment of a dischargeable debt, but also that an agency cannot "deny" a license for that reason. 11 U.S.C. 525(a). Because there is a necessary (and sometimes substantial) period of time between the close of an auction and license awards, Pet. App. 217a; Pet. 19 n.6, even applicants that must pay in full on the license's issuance may declare bankruptcy following the auction but before receiving the license. Relying on the decision below, such applicants can now argue that Section 525 prohibits the Commission from denying (as well as revoking) a license for failure to satisfy a winning bid.[3] The decision thus threatens to render unenforceable the condition—willingness and ability to pay—that is most critical in identifying the applicant that will best use the spectrum in the public interest, even where lump-sum payments are required.

Opp. 2. Not so. The additional auctions were planned and announced publicly in August 1995, well before respondents submitted their winning bids. Pet. App. 308a.

[3] Respondents contend that, under those circumstances, the agreement between the high bidder and the FCC would constitute an "executory contract." If the bidder opted to "assume" the contract, they argue, the debt would become a post-petition obligation that is not "dischargeable" in bankruptcy and thus outside of Section 525's protections. Br. in Opp. 17 & n.8. Respondents cite no case holding that executory contracts are excepted from Section 525, and the contention has been rejected by numerous courts. See, *e.g.*, *Curry* v. *Metropolitan Dade County*, 148 B.R. 966, 972 (S.D. Fla. 1992); *Stoltz* v. *Brattleboro Hous. Auth.*, 259 B.R. 255 (D. Vt. 2001). Moreover, under respondents' theory, their payment obligations also would be non-dischargeable, because their licenses also would be executory in nature. While respondents must obey FCC rules, the FCC must protect respondents' exclusive right to the spectrum. See *Fenix Cattle Co.* v. *Silver*, 625 F.2d 290, 292 (9th Cir. 1980). In any event, like the hypothetical bidder who assumes an executory contract, respondents cannot both retain their licenses and alter in bankruptcy the payment obligations contained in those licenses, as the Second Circuit recognized. See pp. 6-7, *infra*. Respondents' payment obligations are thus no more dischargeable than obligations arising from assumed executory contracts.

Respondents' claim that the FCC can avoid the impact of the decision below by canceling licenses based on an "array of" factors other than nonpayment, Br. in Opp. 18; see also *id.* at 15, is contrary to statutory policy. The submission and fulfillment of the winning bid are the means by which the Commission identifies the applicant that will best use the licenses in the public interest. Pet. App. 234a; Pet. 8, 9-10, 14-16. It was precisely to avoid hearings and multi-factor considerations, with the attendant uncertainty and delays, that Congress instituted market-based auctions. H.R. Rep. No. 111, 103d Cong., 1st. Sess. 248 (1993); Pet. 2-3, 20 n.8.

Finally, respondents suggest that the parties' willingness to enter into a contingent settlement agreement shows that the case lacks importance. Br. in Opp. 15. Respondents' reliance on the failed settlement agreement is of dubious propriety. Cf. Fed. R. Evid. 408. Besides, the settlement—which prompted the Attorney General to transmit legislation to Congress and the Chairman of the FCC personally to testify before Congress—only underscores the fiscal, administrative, and legal significance of this issue. The Attorney General and FCC Chairman, moreover, advised Congress that the proposed settlement left the FCC's auction process subject to attack under the D.C. Circuit's decision and that, as a result, a decision of this Court or separate corrective legislation would be required "to protect the auction process."[4] And it is not without significance that the settlement

---

[4] Statement of FCC Chairman Michael K. Powell, Before the Subcomm. on Telecomm. and the Internet of the House Comm. on Energy and Comm. on the NextWave Settlement Legislation 2 (Dec. 11, 2001); Letter from Attorney General John Ashcroft to Hon. Richard B. Cheney at 1-2 (Nov. 28, 2001) (similar). Respondents further mischaracterize the record when they state (Br. in Opp. 15-16) that the FCC permitted another C-Block bidder, Pocket Communications, to retain licenses for only 63% of its bid. In fact, DCR PCS, Inc., a subsidiary of Pocket Communications, adopted one of the restructuring options offered by the Commission and thus will pay in full for any licenses it retains. See 14 FCC Rcd 1817 (1998); *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 13 FCC Rcd 8345, ¶ 20 (1998); Pet. 6-7. Respondents did not elect any of those restructuring

foundered for lack of congressional approval amid criticism by lawmakers that "the government can no longer afford to simply 'pay off' a company whose only contribution to the American economy has been to manipulate, for private gain, the results of an improperly designed auction of a valuable public good." Letter from Sen. John McCain to Sen. Tom Daschle and Sen. Trent Lott 2 (Oct. 26, 2001).

2. The D.C. Circuit ruled that Section 525 prohibits the FCC from canceling respondents' licenses for failure to satisfy regulatory bid obligations, because those obligations constitute debts that are "dischargeable" in bankruptcy. Pet. App. 41a-44a. In contrast, the Second Circuit ruled that the FCC's timely payment requirement, like its full payment requirement, is a regulatory condition that lies beyond the bankruptcy court's power to "alter[] or impede[]." Pet. App. 119a-120a. See also *id.* at 236a-237a & n.11, 245a n.15; Pet. 22-23 & n.9. Attempting to belittle that inconsistency, respondents insist that the Second Circuit's decision is merely jurisdictional and does not resolve respondents' claims under Section 525. Br. in Opp. 11. Section 525 of the Bankruptcy Code, however, reaches only those debts that are "dischargeable *in the case under this title*," *i.e.*, debts dischargeable *in bankruptcy*. 11 U.S.C. 525(a) (emphasis added). By holding in this very controversy that bankruptcy and district courts cannot modify or discharge the full and timely payment condition of respondents' licenses, the Second Circuit's decision logically foreclosed application of Section 525 to this case. Indeed, while acknowledging the Second Circuit's ruling that "the bankruptcy court had no authority to modify" the FCC's timely payment condition, the D.C. Circuit suggested that "a court of competent jurisdiction (such as this one)" could do so. Pet. App. 42a. The D.C. Circuit's purported authority to discharge the payment obligation, however, does not exist—the authority to discharge debts is vested exclusively in the district and

---

options, instead attempting to keep *all* of their licenses for one-quarter of the bid price. Pet. 7-8, 16.

bankruptcy courts overseeing reorganization proceedings. 28 U.S.C. 1334(a); 11 U.S.C. 1141(d)(1); Pet. 23. In any event, any purported nonbankruptcy power to discharge obligations would not satisfy the terms of Section 525, which requires the obligation to be dischargeable in the case under the Bankruptcy Code. See Pet. 23-24.

The D.C. Circuit's and the Second Circuit's opinions also conflict at a more fundamental level. The D.C. Circuit treated the FCC as an ordinary creditor. The FCC's decision to obtain liens on the licenses as a supplement to the FCC's regulatory authority, in the D.C. Circuit's view, created "standard debt obligations as part of its licensing scheme" and gave it "a creditor relationship with winning bidders." Pet. App. 2a, 40a-41a, 50a. See also Br. in Opp. 20-21. In contrast, the Second Circuit made it clear that any attempt to "turn the FCC into a mere creditor" is "fundamentally mistaken"—even if, "[i]n granting licenses by auction, the FCC acts as creditor and regulator both." Pet. App. 234a-235a, 244a. The agency's "regulatory function is not ended by the bankruptcy of a licensee or license claimant," the Second Circuit held, "and as the *function persists it must perforce be carried out*." *Ibid.* (emphasis added).

3. Respondents argue that the decision below rests on an alternative ground—that the Bankruptcy Code's automatic stay, 11 U.S.C. 362, precluded the FCC from canceling the licenses, because cancellation was tantamount to the enforcement of a lien. The court of appeals, they contend, held that there is no "regulatory exception" to the automatic stay's prohibition on lien enforcement, 11 U.S.C. 362(a)(4)-(5). See Br. in Opp. 19-20. Contrary to respondents' claim, the opinion below nowhere suggests that its discussion of lien enforcement *independently* supports its judgment. To the contrary, the D.C. Circuit made it clear that the judgment rests solely on its construction of Section 525: "In view of our conclusion that the Commission violated section 525 of the Bankruptcy Code in canceling NextWave's licenses," the court of appeals stated, "*we need not consider NextWave's remaining Bankruptcy Code arguments.*" Pet. App. 51a

(emphasis added). The D.C. Circuit did discuss (*id.* at 40a-41a) the application of the automatic stay to lien enforcement efforts, but it did so in *support* of its determination that cancellation of respondents' licenses violated Section 525—specifically, in rejecting the argument that Section 525 should be construed consistent with the Code's structure of preventing bankruptcy law from intruding on regulatory action. See Pet. App. 40a-41a; Pet. 9. Because the D.C. Circuit relied on that reasoning to support its reading of Section 525, it is encompassed within the question presented, Pet. i, as the petition itself makes clear, Pet. 28 n.10.

The D.C. Circuit's reasoning on this point, moreover, defies common sense—and underscores the inconsistency between its decision and the Second Circuit's. Even if the automatic stay prevented the FCC from collecting payment based on the *liens* on respondents' licenses, the full and timely payment requirement nonetheless would retain its character as a regulatory license condition.[5] And because that condition is regulatory in nature, 11 U.S.C. 362(b) excepts it from the automatic stay. Indeed, the Second Circuit expressly so held. Pet. App. 125a (because the "FCC is a governmental unit that is seeking 'to enforce' its 'regulatory power,'" enforcement of payment condition is exempt from automatic stay); see also *id.* at 33a-35a. The decision below never explains why the Commission's decision to create a lien interest in the licenses *in addition to* its regulatory powers somehow deprived the FCC of authority to exercise its regulatory powers. The decision below never explains how that conclusion can be reconciled with the documents that created the liens, which specify that the liens supplement, but do not displace, the FCC's regulatory authority. See Pet. App. 403a-404a; Pet. 29 n.10. And the decision below never reconciles its analysis with the Second

[5] It is far from clear that the automatic stay applies at all. See Pet. 28 n.10. The Second Circuit, moreover, specifically rejected the claim that the lien-enforcement provisions of the automatic stay prevent the FCC from enforcing regulatory payment requirements. Pet. App. 125a & n.7.

Circuit's conclusion that cancellation of respondents' licenses is regulatory action exempt from the automatic stay, even if the FCC can be characterized as having both regulatory and pecuniary interests. See Pet. App. 125a-126a; p. 7, *supra*.[6]

4. Finally, respondents attempt, but fail, to rehabilitate the D.C. Circuit's analysis on the merits. Section 525, by its terms, prohibits governmental agencies from revoking licenses only if they do so *solely because* a debtor has failed to pay a *debt that is dischargeable in bankruptcy*. 11 U.S.C. 525(a). Respondents' Section 525 argument fails on both counts. Respondents' licenses canceled because respondents failed to comply with a regulatory requirement that was imposed as a condition of licensure—a condition that, as the Second Circuit recognized, could not be altered or discharged in bankruptcy. See pp. 6-7, *supra*; Pet. 22-23 & n.9. Likewise, the FCC did not revoke respondents' licenses "solely because" of the nonpayment of a "debt." The government was not concerned only, or even primarily, with the financial consequences of nonpayment. Instead, cancellation followed default as a regulatory matter because respondents' failure to stand behind their winning bids refuted their claims to be the best user of the spectrum.[7]

[6] Respondents also contend that the judgment below is "supported by additional alternative grounds *not* resolved by the D.C. Circuit." Br. in Opp. 21-22 (emphasis added). The alternative ground respondents present —that the FCC violated due process by providing insufficient notice that their licenses would cancel on nonpayment—is without merit. The licenses and the Commission's rules unambiguously provided for license termination for failure to meet regulatory payment obligations. See Pet. 4, 5-6; 47 C.F.R. 1.2110(e)(4) (1997); Pet. App. 388a, 393a, 413a. In any event, any such constitutional claim may be addressed by the court of appeals after any remand by this Court. Nor does this Court's denial of certiorari in *In re GWI PCS 1, Inc.*, 230 F.3d 788 (5th Cir. 2000), cert. denied, 121 S. Ct. 2623 (2001), weigh against review. Although *GWI* was related to this case because both involved the intersection of bankruptcy and communications law, the *GWI* petition concerned the bankruptcy law doctrine of equitable mootness, see 230 F.3d at 799-805, a doctrine upon which this Court has never opined, and which is not involved in this case.

[7] Respondents mischaracterize the FCC's position when they assert that, under it, Section 525 would "be deemed inapplicable whenever an

By holding that the Bankruptcy Code nonetheless bars the FCC from withdrawing licenses for breach of the regulatory payment requirement, the D.C. Circuit unnecessarily converted Section 525(a) into an impediment to the market-based spectrum allocation mechanism established in Section 309(j). See Pet. 21-22. By preventing the FCC from enforcing that requirement, the court contravened Section 309(j)'s express direction that "[n]othing * * * in the use of competitive bidding"—including the fact that bidding results in payment obligations—"shall diminish the authority of the [FCC] * * * to regulate or reclaim spectrum licenses." 47 U.S.C. 309(j)(6)(C). See Pet. 26. And by treating the FCC as a mere creditor and the regulatory payment obligation as a dischargeable debt, the D.C. Circuit adopted a view of Section 309(j), the FCC's role, and the Bankruptcy Code that is irreconcilable with the decisions of the Second Circuit in this very case. Accordingly, this Court's review is warranted.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General[*]

FEBRUARY 2002

---

agency chooses to promulgate a regulation making payment of debts a regulatory condition of licensure." Br. in Opp. 27. It is not enough that a payment requirement purport to be regulatory. The requirement in fact must serve a regulatory purpose. In this case, both the Second Circuit and the D.C. Circuit agreed that the FCC's full and timely payment requirement serves a regulatory rather than financial purpose. Pet. App. 24a, 125a-126a, 228a-230a. Respondents err in asserting (Br. in Opp. 26) that courts "uniformly hold that 525(a) is applicable" where the payment requirement "serves regulatory interests." The cases they cite involved efforts to use licensure as a means of collecting debts for financial purposes. They did not involve payment requirements that serve regulatory purposes, such as identifying the applicant that will best use an exclusive license in the public interest.

[*] The Solicitor General is disqualified in this case.

Supreme Court, U.S.
FILED
MAY - 6 2002
OFFICE OF THE CLERK

(18) (15)

Nos. 01-653, 01-657

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL., RESPONDENTS

ARCTIC SLOPE REGIONAL CORP., ET AL., PETITIONERS

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL., RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

DONALD B. VERRILLI, JR.*
IAN HEATH GERSHENGORN
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

THOMAS G. HUNGAR
DOUGLAS R. COX
MARK E. PAPADOPOULOS
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

*Counsel of Record for Respondents

PAUL CLEMENT*
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

*Counsel of Record for Petitioner in No. 01-653

MICHELE C. FARQUHAR
JONATHAN S. FRANKLIN*
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

*Counsel of Record for Petitioners in No. 01-657

PETITIONS FOR WRIT OF CERTIORARI FILED: OCT. 19, 2001
CERTIORARI GRANTED: MAR. 4, 2002

72pp

TABLE OF CONTENTS

	Page
United States Court of Appeals for the District of Columbia Circuit, Docket Entries for NextWave Personal Communications, et al., Petitioners v. Federal Communications Commission, et al., Respondents, No. 00-1402	1
United States Court of Appeals for the District of Columbia Circuit, Docket Entries for NextWave Personal Communications, et al., Petitioners v. Federal Communications Commission, et al., Respondents, No. 00-1403	33
Proof of Claim	34
Declaration of Frank A. Cassou in Support of NextWave's Motion for a Stay Pending Judicial Review or for Expedited Consideration	37
Objection of Federal Communications Commission to Debtors' Modified First Amended Joint Plan of Reorganization	52
Letter to Chairman W.J. Tauzin, Subcommittee on Telecommunications, Trade, and Consumer Protection, Committee on Commerce, U.S. House of Representatives	55
Letter to Cady Thomas, Office of the Hon. Senator Jesse Helms	59
Letter to the Hon. J. Dennis Hastert, The Speaker, U.S. House of Representatives	63
Letter to Magalie Salas, Secretary, Federal Communications Commission	66
Letter to Michael R. Wack, V.P. Regulation, Next-Wave Telecom Inc.	69

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOCKET NO. 00-1402

NEXTWAVE PERSONAL COMMUNICATIONS, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
RESPONDENTS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/15/00	PETITION FOR REVIEW CASE docketed. Petition for Review filed by Petitioner NextWave Prsnal Comm, Petitioner NextWave Power Prt. [544554-1] (lme) [00-1402]
9/15/00	STATEMENT filed by Petitioner NextWave Prsnal Comm, Petitioner NextWave Power Prt pursuant to FRAP 26.1 providing corporate disclosure listing [545060-1] Certificate of Service date 9/15/00 (lme) [00-1402]
9/21/00	CLERK'S ORDER filed to consolidate cases [545165-1]. [Entry Date: 9/21/00] [00-1402, 00-1403] (lme) [00-1402 00-1403]

DATE	PROCEEDINGS
9/21/00	CLERK'S ORDER filed directing Petitioner to file [545167-1]: docketing statement due 10/23/00 for NextWave Power Prt in 00-1402; certificate of counsel due 10/23/00 for NextWave Power Prt in 00-1402; statement of issues due 10/23/00 for NextWave Power Prt in 00-1402, for Theodore B. Olson in 00-1403; any procedural motions due 10/23/00 for NextWave Power Prt in 00-1402; deferred appendix notice due 10/23/00 for NextWave Power Prt in 00-1402; any dispositive motions due 11/6/00 for NextWave Power Prt in 00-1402;, directing Respondent to file [545167-2]: any procedural motions due 10/23/00 for USA in 00-1402; appearance form due 11/6/00 for FCC in 00-1402; certified index to the record due 11/6/00 for FCC in 00-1402; any dispositive motions due 11/6/00 for FCC in 00-1402;. [Entry Date: 9/21/00] [00-1402, 00-1403] (lme) [00-1402 00-1403]
9/25/00	MOTION filed (5 copies) (certificate of service dated 9/25/00) to allow to intervene in support of respondent [546242-1]. Motion filed by BellSouth Corp in 00-1402, BellSouth Cell Corp in 00-1402. (mcm) [00-1402]

DATE	PROCEEDINGS
9/25/00	STATEMENT filed by Movant-Intervenor-Respondent BellSouth Corp in 00-1402, Movant-Intervenor-Respondent BellSouth Corp in 00-1402 pursuant to FRAP 26.1 providing corporate disclosure listing [546243-1] Certificate of Service date 9/25/00 (mcm) [00-1402]
9/26/00	MOTION filed (5 copies) by Petitioners NextWave Prsnal Comm and NextWave Power Prt in 00-1402 and 00-1403 (certificate of service dated 9/26/00) for stay of order of agency [546391-1] Response due on 10/6/00 in 00-1402, in 00-1403 or to expedite case [546391-2]. [00-1402, 00-1403] (mam) [00-1402 00-1403]
9/27/00	MOTION filed (5 copies) (certificate of service dated 9/27/00) to allow to intervene [548078-1]. Motion filed by Cellco Prtnshp in 00-1402 (mcm) [00-1402]
9/27/00	STATEMENT filed by Movant-Intervenor Cellco Prtnshp in 00-1402 pursuant to FRAP 26.1 providing corporate disclosure listing [548079-1] Certificate of Service date 9/27/00 (mcm) [00-1402]

DATE	PROCEEDINGS
9/29/00	MOTION filed (5 copies) (certificate of service dated 9/28/00) to allow amicus curiae [547131-1]. Motion filed by Kenneth N. Klee in 00-1402, 00-1403. [00-1402, 00-1403] (mcm) [00-1402 00-1403]
10/2/00	RESPONSE lodged [547138-1] (5 copies) by Movant-AmicusCuriae-Petitioner Kenneth N. Klee in 00-1402, Movant-AmicusCuriae-Petitioner Kenneth N. Klee in 00-1403 (certificate of service dated 9/28/00) to a motion stay case [546391-1] and to a motion expedite case [546391-2] in 00-1402 and 00-1403. [00-1402, 00-1403] (mcm) [00-1402 00-1403]
10/3/00	MOTION filed (5 copies) (certificate of service dated 10/3/00) to allow to intervene [549648-1]. Motion filed by VoiceStream Wireless in 00-1402 (mam) [00-1402]
10/3/00	STATEMENT filed by Movant-Intervenor VoiceStream Wireless in 00-1402 pursuant to FRAP 26.1 providing corporate disclosure listing [549665-1] Certificate of Service date 10/3/00 (attached to petition for review) (mam) [00-1402]

DATE	PROCEEDINGS
10/3/00	MOTION filed (5 copies) (certificate of service dated 10/3/00) to allow to intervene [549666-1]. Motion filed by AT&T Wireless Svc in 00-1402 (mam) [00-1402]
10/3/00	STATEMENT filed by Movant-Intervenor AT&T Wireless Svc in 00-1402 pursuant to FRAP 26.1 providing corporate disclosure listing [549672-1] Certificate of Service date 10/3/00 (attached to motion to intervene) (mam) [00-1402]
10/4/00	MOTION filed (5 copies) (certificate of service dated 10/4/00) to allow to intervene [549673-1] in support of respondent . Motion filed by Cell Telecom Indust in 00-1402 (mam) [00-1402]
10/4/00	STATEMENT filed by Movant-Intervenor-Respondent Cell Telecom Indust in 00-1402 pursuant to FRAP 26.1 providing corporate disclosure listing [549676-1] Certificate of Service date 10/4/00 (mam) [00-1402]
10/5/00	MOTION filed (5 copies) (certificate of service dated 10/5/00) to allow to intervene [549683-1] in support of respondent. Motion filed by Dobson Comm Corp in 00-1402 (mam) [00-1402]

DATE	PROCEEDINGS
10/5/00	STATEMENT filed by Movant-Intervenor-Respondent Dobson Comm Corp in 00-1402 pursuant to FRAP 26.1 providing corporate disclosure listing [549688-1] Certificate of Service date 10/5/00 (mam) [00-1402]
10/5/00	MOTION filed (5 copies) (certificate of service dated 10/5/00) to allow to intervene [549689-1] in support of respondents. Motion filed by Sprint Spectrum in 00-1402 (mam) [00-1402]
10/5/00	STATEMENT filed by Movant-Intervenor-Respondent Sprint Spectrum in 00-1402 pursuant to FRAP 26.1 providing corporate disclosure listing [549690-1] Certificate of Service date 10/5/00 (attached to motion to intervene) (mam) [00-1402]
10/6/00	OPPOSITION filed [549623-1] (5 copies) by Respondent FCC in 00-1402 and 00-1403 (certificate of service dated 10/6/00) to a motion stay case [546391-1], or to expedite in 00-1402 and 00-1403 [00-1402, 00-1403] (mam) [00-1402 00-1403]
10/6/00	MOTION filed (5 copies) (certificate of service dated 10/6/00) to allow to intervene [549692-1] in support of respondent. Motion filed by TeleCorp PCS Inc in 00-1402 (mam) [00-1402]

DATE	PROCEEDINGS
10/6/00	STATEMENT filed by Movant-Intervenor-Respondent TeleCorp PCS Inc in 00-1402 pursuant to FRAP 26.1 providing corporate disclosure listing [549693-1] Certificate of Service date 10/6/00 (attached to motion to intervene) (mam) [00-1402]
10/6/00	MOTION filed (5 copies) (certificate of service dated 10/6/00) to allow to intervene [549694-1]. Motion filed by Nextel Comm Inc in 00-1402 (mam) [00-1402]
10/6/00	STATEMENT filed by Movant-Intervenor Nextel Comm Inc in 00-1402 pursuant to FRAP 26.1 providing corporate disclosure listing [549695-1] Certificate of Service date 10/6/00 (attached to motion to intervene) (mam) [00-1402]
10/6/00	MOTION filed (5 copies) (certificate of service dated 10/6/00) to allow to intervene [549696-1]. Motion filed by Arctic Slope Regn in 00-1402 (mam) [00-1402]
10/6/00	STATEMENT filed by Movant-Intervenor Arctic Slope Regn in 00-1402 pursuant to FRAP 26.1 providing corporate disclosure listing [549697-1] Certificate of Service date 10/6/00 (mam) [00-1402]

DATE	PROCEEDINGS
10/6/00	MOTION filed (5 copies) (certificate of service dated 10/6/00) to allow to intervene [549698-1]. Motion filed by Cncl Tree Comm in 00-1402 (mam) [00-1402]
10/6/00	STATEMENT filed by Movant-Intervenor Cncl Tree Comm in 00-1402 pursuant to FRAP 26.1 providing corporate disclosure listing [549700-1] Certificate of Service date 10/6/00 (mam) [00-1402]
10/6/00	OPPOSITION lodged [549702-1] (5 copies) by Movant-Intervenor Arctic Slope Regn and Cncl Tree Comm in 00-1402 (certificate of service dated 10/6/00) to a motion stay case [546391-1] and to expedite [546391-2] . (mam) [00-1402]
10/6/00	OPPOSITION lodged [549704-1] (5 copies) by Movant-Intervenor-Respondent Cell Telecom Indust in 00-1402 (certificate of service dated 10/6/00) to a motion stay case [546391-1] and to expedite. (mam) [00-1402]

DATE	PROCEEDINGS
10/16/00	REPLY filed [550534-1] (5 copies) by Petitioners NextWave Prsnal Comm and NextWave Power Prt in 00-1402 and 00-1403 (certificate of service dated 10/16/00) to a response to the motion stay case [546391-1] or to expedite in 00-1402 and 00-1403 [00-1402, 00-1403] (mam) [00-1402 00-1403]
10/17/00	MOTION filed (5 copies) by Respondent FCC in 00-1402 and 00-1403 (certificate of service dated 10/17/00) to strike [550590-1] attachments to petitioners' reply to responses to motion for stay [550534-1] in 00-1402 and 00-1403 . [00-1402, 00-1403] (mam) [00-1402 00-1403]
10/17/00	OPPOSITION filed [550597-1] (5 copies) by Petitioners NextWave Prsnal Comm and NextWave Power Prt in 00-1402 and 00-1403 (certificate of service dated 10/17/00) to a motion strike document [550590-1] in 00-1402 and 00-1403 [00-1402, 00-1403] (mam) [00-1402 00-1403]
10/18/00	REPLY filed [552795-1] (5 copies) by Respondent FCC in 00-1402 and 00-1403 (certificate of service dated 10/18/00) to a response to the motion strike document [550590-1] in 00-1402 and 00-1403 [00-1402, 00-1403] (mam) [00-1402 00-1403]

DATE	PROCEEDINGS
10/23/00	INITIAL SUBMISSIONS filed by Petitioner NextWave Prsnal Comm in 00-1402, Petitioner NextWave Power Prt in 00-1402, Appellant NextWave Power Prt in 00-1403, Appellant NextWave Prsnal Comm in 00-1403 [551942-1] : docketing statement; certificate of counsel; statement of issues; deferred appendix notice (Deferred Appendix needed = n); . [00-1402, 00-1403] (mpt) [00-1402 00-1403]
10/24/00	LETTER filed by FCC in 00-1402 and 00-1403 pursuant to FRAP 28j advising of additional authorities [552698-1]. Certificate of service date 10/24/00. [00-1402, 00-1403] (mam) [00-1402 00-1403]
10/25/00	CLERK'S ORDER filed granting non-party motion to allow amicus filed by Kenneth N. Klee in 00-1402, in 00-1403. The Clerk is directed to file the lodged response of amicus curiae [547138-1]. [Entry Date: 10/25/00] [00-1402, 00-1403] (mcm) [00-1402 00-1403]
10/25/00	PER ABOVE ORDER lodged response [547138-1] in 00-1402, response [547138-1] in 00-1403 is filed. [00-1402, 00-1403] (mcm) [00-1402 00-1403]

DATE	PROCEEDINGS
10/25/00	LETTER filed by NextWave in 00-1402 and 00-1403 pursuant to FRAP 28j advising of additional authorities [552688-1] . Certificate of service date 10/25/00. [00-1402, 00-1403] (mam) [00-1402 00-1403]
10/26/00	ENTRY OF APPEARANCE filed by Attorney Stanley R. Scheiner for Respondent FCC in 00-1402, Daniel McMullen Armstrong for Respondent FCC in 00-1402, Christopher J. Wright for Respondent FCC in 00-1402 [552897-1] . (lme) [00-1402]
10/26/00	ENTRY OF APPEARANCE filed by Attorney Stewart Allen Block for Respondent FCC in 00-1402 [552901-1]. (lme) [00-1402]
11/3/00	LETTER filed by Petitioner NextWave Prsnal Comm in 00-1402 and 00-1403 pursuant to FRAP 28j advising of additional authorities [556001-1]. Certificate of service date 11/3/00. [00-1402, 00-1403] (mam) [00-1402 00-1403]
11/6/00	INITIAL SUBMISSIONS filed by Respondent FCC in 00-1402 [555323-1]: certified index to the record. (lme) [00-1402]

DATE	PROCEEDINGS
11/7/00	MOTION (styled "emergency motion to expedite briefing schedule and consideration of this case") filed (5 copies) by Respondent FCC in 00-1402, Appellee FCC in 00-1403 (certificate of service dated 11/7/00) to expedite case [556009-1]. [00-1402, 00-1403] (mam) [00-1402 00-1403]
11/9/00	RESPONSE filed [556119-1] (5 copies) by Petitioner NextWave Prsnal Comm in 00-1402, Petitioner NextWave Power Prt in 00-1402, Appellant NextWave Power Prt in 00-1403, Appellant NextWave Prsnal Comm in 00-1403 (certificate of service dated 11/9/00) to the FCC's emergency motion to expedite briefing and consideration of this case. [00-1402, 00-1403] (mcm) [00-1402 00-1403]
11/9/00	REPLY filed [556125-1] (5 copies) by Respondent FCC in 00-1402, Appellee FCC in 00-1403 (certificate of service dated 11/9/00) to the response of Nextwave to the emergency motion to expedite briefing and consideration of this case. [00-1402, 00-1403] (mcm) [00-1402 00-1403]

DATE	PROCEEDINGS
11/13/00	CLERK'S ORDER filed granting non-party motion to intervene filed by TeleCorp PCS Inc [549692-1] granting non-party motion to intervene filed by Nextel Comm Inc [549694-1] granting non-party motion to intervene filed by Arctic Slope Regn [549696-1] granting non-party motion to intervene filed by Cncl Tree Comm [549698-1] granting non-party motion to intervene filed by Dobson Comm Corp [549683-1] granting non-party motion to intervene filed by Sprint Spectrum [549689-1] granting non-party motion to intervene filed by Cell Telecom Indust [549673-1] granting non-party motion to intervene filed by VoiceStream Wireless [549648-1] granting non-party motion to intervene filed by AT&T Wireless Svc [549666-1] granting non-party motion to intervene filed by Cellco Prtnshp [548078-1] granting non-party motion to intervene filed by BellSouth Corp, BellSouth Cell Corp [546242-1]. [Entry Date: 11/13/00] (mam) [00-1402]
11/13/00	PER CURIAM ORDER filed denying motion stay case [546391-1]i; dismissing motion to strike attachments as moot and establishing briefing schedule and format: Petitioner's brief due on 12/11/00 in 00-1402, in 00-1403 ; Petitioner's appendix due on 12/11/00 in 00-

DATE	PROCEEDINGS
	1402 ; Intervenor supporting Petitioner's brief due 12/18/00 in 00-1402; Amicus Curiae's brief due on 12/18/00 in 00-1402; Respondent's brief due on 1/17/01 in 00-1402; Intervenor supportg Respondent's brief due 1/24/01 in 00-1402; Petitioner's reply brief due on 1/31/01 in 00-1402, in 00-1403. All amici Curiae and intervenors supporting a particular party shall join in a single brief not exceeding 8,750 wds. Before Judges Ginsburg, Tatel, Garland. [Entry Date: 11/13/00] [00-1402, 00-1403] (mam) [00-1402 00-1403]
11/13/00	PER ABOVE ORDER lodged responses [549702-1], [549704-1] are filed. (mcm) [00-1402]
11/20/00	CLERK'S ORDER filed to schedule oral argument [557229-1] before Judge Initials: DBS DST MBG on 3/15/01 at 9:30 AM . [Entry Date: 11/20/00] [00-1402, 00-1403] (cwc) [00-1402 00-1403]
12/11/00	JOINT APPENDIX (volume I and II) filed by Petitioners NextWave Prsnal Comm in 00-1402, and NextWave Power Prt in 00-1402, 00-1403, [562007-1]. Copies: 10. Certificate of service date 12/11/00. [00-1402, 00-1403] (mpt) [00-1402 00-1403]

DATE	PROCEEDINGS
12/11/00	BRIEF filed by Petitioners NextWave Prsnal Comm NextWave Power Prt in 00-1402 [562085-1]. Copies: 15 . Certificate of service date 12/11/00. [00-1402, 00-1403] (mpt) [00-1402 00-1403]
12/19/00	MOTION lodged (5 copies) (certificate of service dated 12/18/00) to allow amicus curiae [563727-1]. Motion submitted by Movant-AmicusCuriae-Petitioner Robert E. Torricelli, Movant-AmicusCuriae-Petitioner Charles Schumer, Movant-Amicus Curiae-Petitioner John Conyers, Movant-AmicusCuriae-Petitioner Jarrold Nadler, Movant-AmicusCuriae-Petitioner Lindsey Graham, Movant-AmicusCuriae-Petitioner Offcl Com Unsec Crdt, Movant-Amicus Curiae-Petitioner D&P NextWave Prt, Amicus Curiae for Petitioner Kenneth N. Klee in 00-1402 and 00-1403. [00-1402, 00-1403] (mcm) [00-1402 00-1403]
12/19/00	BRIEF lodged by Amicus Curiae for Petitioner Kenneth N. Klee, Movant-Amicus Curiae-Petitioner Robert E. Torricelli, Movant-Amicus Curiae-Petitioner Charles Schumer, Movant-AmicusCuriae-Petitioner John Conyers, Movant-Amicus Curiae-Petitioner Jarrold Nadler, Movant-AmicusCuriae-Petitioner Lindsey Graham, Movant-AmicusCuriae-Petitioner

DATE	PROCEEDINGS
	Offcl Com Unsec Crdt, Movant-Amicus Curiae-Petitioner D&P NextWave Prt, Amicus Curiae for Petitioner Kenneth N. Klee, [563733-1]. Copies: 14. Certificate of service date 12/18/00. [00-1402, 00-1403] (mcm) [00-1402 00-1403]
12/20/00	Letter sent Attorney Non-Member letter. Application for admission - due 1/19/01 for Emanuel C. Grillo. sent: letter aty appl for adm [563780-1]. (mcm) [00-1402]
12/20/00	Letter sent Attorney Non-Member letter. Application for admission - due 1/19/01 for David Friedman. Documents sent: letter aty appl for adm [563786-1]. [ddl extended until 3/9/01] (mcm) [00-1402]
12/20/00	MOTION filed (5 copies) by Movant-Amicus Curiae-Petitioner Robert E. Torricelli, Charles E. Schumer, John Conyers, Jerrold Nadler, Lindsey Graham, Offcl Com Unsec Crdt and D&P NextWave Prt in 00-1402 and 00-1403 (certificate of service dated 12/20/00) for leave to file [564354-1] a non-party motion to allow amicus out of time and a brief in 00-1402 and 00-1403. [00-1402, 00-1403] (mam) [00-1402 00-1403]

DATE	PROCEEDINGS
12/26/00	CLERK'S ORDER filed granting motion for leave to file a motion to participate as amicus curiae filed by Robert E. Torricelli, Charles E. Schumer, John Conyers Jr., Jerrold Nadler, Lindsey Graham, Offcl Com Unsec Crdt, D&P NextWave Prt [564354-1]; Directing Clerk to file non-party motion to allow amicus [563727-1]; Granting non-party motion allow amicus; Directing Clerk to file the lodged brief. [563733-1] [Entry Date: 12/26/00] [00-1402, 00-1403] (cwc) [00-1402 00-1403]
12/26/00	PER ABOVE ORDER lodged non-party motion to allow amicus [563727-1] is filed. [00-1402, 00-1403] (cwc) [00-1402 00-1403]
12/26/00	PER ABOVE ORDER lodged brief of amicus curiae is filed. [563733-1] [00-1402, 00-1403] (cwc) [00-1402 00-1403]
1/17/01	SUPPLEMENTAL APPENDIX lodged by Respondent FCC in 00-1402, Appellee FCC in 00-1403 [569596-1]. Copies: 10. Certificate of date 1/17/01. [00-1402, 00-1403] (mpt) [00-1402 00-1403]

DATE	PROCEEDINGS
1/17/01	MOTION filed (5 copies) by Respondent FCC in 00-1402, and in 00-1403 (certificate of service dated 1/17/01) for leave to file [569603-1] a supplemental appendix [569596-1] in 00-1402 and 00-1403. (mpt) [00-1402 00-1403]
1/17/01	BRIEF filed by Respondents FCC in 00-1402 and 00-1403 and USA in 00-1402 [569664-1]. Copies: 15. Certificate of service date 1/17/01. [00-1402, 00-1403] (mam) [00-1402 00-1403]
1/23/01	MOTION filed (5 copies) by Intervenor Nextel Comm Inc in 00-1402 (certificate of service dated 1/23/01) to withdraw as a party-intervenor to the proceedings. (mcm) [00-1402]
1/24/01	BRIEF filed by Intervenor for Respondent BellSouth Corp in 00-1402, Intervenor for Respondent BellSouth Cell Corp in 00-1402, Intervenor Cellco Prtnshp in 00-1402, Intervenor VoiceStream Wireless in 00-1402, Intervenor AT&T Wireless Svc in 00-1402, Intervenor for Respondent Cell Telecom Indust in 00-1402, Intervenor for Respondent Dobson Comm Corp in 00-1402, Intervenor for Respondent Sprint Spectrum in 00-1402 [571352-1]. Copies: 14. Certificate of service date 1/24/01.

DATE	PROCEEDINGS
	[REPLACED WITH CORRECTED BRIEF ON 1/25/01 -Id# 572310] (mcm) [00-1402]
1/25/01	CORRECTED BRIEF filed by Intervenor for Respondent BellSouth Corp in 00-1402, Intervenor for Respondent BellSouth Cell Corp in 00-1402, Intervenor Cellco Prtnshp in 00-1402, Intervenor VoiceStream Wireless in 00-1402\ Intervenor AT&T Wireless Svc in 00-1402, Intervenor for Respondent Cell Telecom Indust in 00-1402, Intervenor for Respondent Dobson Comm Corp in 00-1402, Intervenor for Respondent Sprint Spectrum in 00-1402 [572310-1]. Copies: 14. Certificate of date 1/25/01. [REPLACES BRIEF FILED ON 1/24/01 - ID# 571352] (mcm) [00-1402]
1/26/01	CLERK'S ORDER filed granting motion filed by Nextel Comm Inc to withdraw [571778-1]; Clerk to note the docket to reflect the withdrawal of Nextel Comm Inc as an intervenor. [Entry Date: 1/26/01] [00-1402, 00-1403] (cwc) [00-1402 00-1403]
1/31/01	REPLY BRIEF filed by Petitioners NextWave Prsnal Comm and NextWave Power Prt in 00-1402 and 00-1403 [573909-1]. Copies: 15. Certificate of service date 1/31/01. [00-1402, 00-1403] (mam) [00-1402 00-1403]

DATE	PROCEEDINGS
2/9/01	CLERK'S ORDER filed granting motion leave to file. [569603-1] Directing the Clerk to file the lodged supplemental appendix. [569596-1] [Entry Date: 2/9/01] [00-1402, 00-1403] (lej) [00-1402 00-1403]
2/9/01	Per Above Order lodged supplemental appendix [569596-1] is filed. [00-1402, 00-1403] (lej) [00-1402 00-1403]
2/26/01	PER CURIAM ORDER filed to allocate oral argument times: APET minutes- 15 ERES minutes-15; Petitioners may elect to share argument time with amicus curiae and respondents may elect to share time with intervenors. [578149-1], Form 72 notice of attorney arguing case - [578149-2] due 3/8/01. [Entry Date: 2/26/01] [00-1402, 00-1403] (cwc) [00-1402 00-1403]
2/26/01	SUPPLEMENT (Errata) to [578988-1] appellee/respondent brief [569664-1] filed by Respondent FCC in 00-1402, Appellee FCC in 00-1403. Errata consists of correction to citation. [00-1402, 00-1403] (mcm) [00-1402 00-1403]
3/1/01	LETTER filed by Respondent FCC in 00-1402 pursuant to FRAP 28j advising of additional authorities (report to Congress) [579886-1]. Certificate of service date 3/1/01. (mcm) [00-1402]

DATE	PROCEEDINGS
3/1/01	FORM 72 filed by Attorney Richard Gray Taranto [580086-1] on behalf of intervenors Cellular Tele Ind Assn, et al. [580086-2] . [00-1402, 00-1403] (cwc) [00-1402 00-1403]
3/5/01	FORM 72 filed by Attorney Daniel McMullen Armstrong on behalf of appellee FCC [580220-1] [580220-2]. [00-1402, 00-1403] (cwc) [00-1402 00-1403]
3/7/01	FORM 72 filed by Attorney Theodore B. Olson on behalf of petitioners NextWave, et al. [580884-1] [580884-2]. [00-1402, 00-1403] (cwc) [00-1402 00-1403]
3/8/01	RESPONSE filed [585884-1] (5 copies) by Petitioners NextWave Prsnal Comm and NextWave Power Prt (certificate of service dated 3/7/01) to a motion leave to file [584873-1] [00-1402, 00-1403] (cwc) [00-1402 00-1403]
3/15/01	ORAL ARGUMENT HELD before Sentelle, Tatel, Garland. [00-1402, 00-1403] (sll) [00-1402 00-1403]

DATE	PROCEEDINGS
3/21/01	RESPONSE (styled "post-argument memorandum) lodged [584872-1] (5 copies) by Respondent FCC in 00-1402 to questions concerning issue raised at oral argument (certificate of service dated 3/21/01) (mam) [00-1402]
3/21/01	MOTION filed (5 copies) by Respondent FCC in 00-1402 (certificate of service dated 3/21/01) for leave to file [584873-1] a response [584872-1]. (mam) [00-1402]
3/22/01	LETTER filed by Respondent FCC in response to a question raised at oral argument [585083-1]. Certificate of service date 3/22/01. [00-1402, 00-1403] (cwc) [00-1402 00-1403]
3/27/01	RESPONSE lodged [585979-1] (5 copies) by Petitioners NextWave Prsnal Comm et al. in 00-1402 and Appellants NextWave Power Prt et al. in 00-1403 (certificate of service dated 3/27/01) to FCC's post argument memorandum. [00-1402, 00-1403] (mam) [00-1402 00-1403]

DATE	PROCEEDINGS
3/27/01	OPPOSITION filed [585980-1] (5 copies) by Petitioners NextWave Prsnal Comm et al. in 00-1402 and Appellants NextWave Power Prt et al. in 00-1403 (certificate of service dated 3/27/01) to a motion leave to file [584873-1] a post-argument memorandum, or, in the alternative MOTION filed, for leave to file [585980-2] a response to the post-argument memorandum. [00-1402, 00-1403] (mam) [00-1402 00-1403]
4/4/01	TRANSCRIPT of oral argument held on 3/15/01. [545011-1] [00-1402, 00-1403] (mcm) [00-1402 00-1403]
4/26/01	LETTER filed by appellee FCC pursuant to FRAP 28j advising of additional authorities [592601-1]. Certificate of service date 4/25/01. [00-1402, 00-1403] (cwc) [00-1402 00-1403]
5/31/01	NOTICE (in letter form) filed by Petitioners NextWave Prsnal Comm and NextWave Power Prt in 00-1402 and Appellants NextWave Power Prt and NextWave Prsnal Comm in 00-1403 that Mr. Hungar is replacing Mr. Olson as counsel of record. Mr. Olson is joining the Department of Justice. Certificate of service date 5/29/01. [00-1402, 00-1403] (mam) [00-1402 00-1403]

DATE	PROCEEDINGS
6/22/01	JUDGMENT reversing [605020-1] and remanding case to the FCC [605020-2] for proceedings not inconsistent with accompanying opinion. Before Judges Sentelle, Tatel, Garland. [Entry Date: 6/22/01] [00-1402, 00-1403] (deb) [00-1402 00-1403]
6/22/01	OPINION [605021] (40 pgs) for the Court filed by Judge Tatel. [00-1402, 00-1403] (deb) [00-1402 00-1403]
6/22/01	CLERK'S ORDER filed [605022] directing Clerk to withhold issuance of the mandate [605022-1] pending disposition of any timely petition for rehearing. [Entry Date: 6/22/01] [00-1402, 00-1403] (deb) [00-1402 00-1403]
6/28/01	PER CURIAM ORDER filed [606330] granting motion of respondent FCC for elave [*sic*] to file a post-argument memorandum and granting petitioners' alternative motion for leave to file a response; Clerk directed to file the lodged post-argument memorandum and response. [585980-2] [584873-1] [585979-1] [584872-1] Before Judges Sentelle, Tatel, Garland [Entry Date: 6/28/01] [00-1402, 00-1403] (cwc) [00-1402 00-1403]

DATE	PROCEEDINGS
6/28/01	PER ABOVE ORDER lodged post-argument memorandum and response are filed [585979-1] [584872-1] [00-1402, 00-1403] (cwc) [00-1402 00-1403]
7/5/01	FIRST CLASS MAIL [610241-1] RETURNED marked unknown mark. Mail was in response to a Per Curiam opinion [605021-1]. (lme) [00-1402]
7/17/01	FIRST CLASS MAIL [610249-1] RESENT of Per Curiam opinion writing judge on opinion [605021-1]. Reason mail resent: I'm resending the mail back to the same address because the reason why they sent it back was unknown. (lme) [00-1402]
8/6/01	MOTION filed (5 copies) by Respondent FCC in 00-1402, Appellee FCC in 00-1403 (certificate of service dated 8/6/01 service by hand to NextWave) to stay issuance of the mandate. [00-1402, 00-1403] (mam) [00-1402 00-1403]
8/16/01	OPPOSITION filed [618339-1] (5 copies) by Petitioners NextWave Prsnal Comm and NextWave Prsnal Comm in 00-1402 and 00-1403 (certificate of service dated 8/16/01 [FCC was served by hand]) to a motion stay mandate [616433-1] in 00-1402 00-1403 [00-1402, 00-1403] (mam) [00-1402 00-1403]

DATE	PROCEEDINGS
8/17/01	SUPPLEMENT to [619406-1] motion stay mandate [616433-1] filed by Petitioner NextWave Prsnal Comm in 00-1402, Petitioner NextWave Power Prt in 00-1402. Declaration from Robert Symington, which was attached as Exhibit C. (lme) [00-1402]
8/22/01	REPLY filed [620387-1] (5 copies) by Respondent FCC in 00-1402 and 00-1403 (certificate of service dated 8/22/01) to response to motion to stay mandate [00-1402, 00-1403] (mam) [00-1402 00-1403]
8/23/01	PER CURIAM ORDER filed [619678] denying motion stay mandate [616433-1] filed by FCC. In order to obtain a stay of the mandate pending a petition for writ of certiorari, the FCC must show that the "petition would present a substantial question and that there is good cause for a stay." The FCC has not demonstrated that the petition would present a substantial question. Furthermore, in light of petitioners' stipulation that they will make the effectiveness of their plan of reorganization contingent upon a final decision from the Supreme Court on the issues to be raised in the FCC's petition for writ of certiorari, the FCC cannot demonstrate that any substantial harm would result from the continuation of the bankruptcy proceedings during the limited pendency of the certiorari petition. The clerk is directed to issue the mandate seven days from the date of this order. Before Judges Sentelle, Tatel, Garland. [Entry Date: 8/23/01] [00-1402, 00-1403] (mcm) [00-1402 00-1403]

DATE	PROCEEDINGS
8/30/01	MANDATE ISSUED to FCC [621396-1]. [00-1402, 00-1403] (mcm) [00-1402 00-1403]
9/4/01	FIRST CLASS MAIL [625860-1] RETURNED marked Return to sender Mail was in response an order denying motion to stay issuance of the mandate. [00-1402, 00-1403] (mpt) [00-1402 00-1403]
9/17/01	LETTER dated 9/13/01 received from S. Ct. advising that application for extension of time to file petition for writ of certiorari was presented to Chief Justice who on 9/13/01 extended time to and including 10/19/01. [626171-1] [S. Ct. Application No. 01A238]. Certificate of service date. [00-1402, 00-1403] (mam) [00-1402 00-1403]

DATE	PROCEEDINGS
9/17/01	LETTER dated 9/13/01 received from S. Ct. advising that application for extension of time to file petition for writ of certiorari was presented to Chief Justice who, on 9/12/01 extended time to 10/19/01. [626172-1] [S.Ct. Application No. 01A237] . Certificate of service date. [00-1402, 00-1403] (mam) [00-1402 00-1403]
9/17/01	LETTER dated 9/13/01 received from S. Ct. advising that motion to extend time to file petition for writ of certiorari was presented to Chief Justice who, on 9/13/01 extended the time to 10/19/01. [626174-1] [S. Ct. Application No. 01A239] . Certificate of service date.[00-1402, 00-1403] (mam) [00-1402 00-1403]
9/19/01	NOTICE filed by Francis Lorson, Chief Deputy Clerk, Supreme Court of the U.S., informing the court that on September 17, 2001, an application for extension of time to file a petition for writ of certiorari in case No. 01A248. On September 17, 2001, the Chief Justice extended the time to and including October 19, 2001 [626305-1]. [00-1402, 00-1403] (lvs) [00-1402 00-1403]

DATE	PROCEEDINGS
11/8/01	LETTER dated 10/22/01 received from Clerk's Office, S. Ct., advising that petition for a writ of certiorari was filed 10/19/01 and docketed on 10/19/01 as (S. Ct. No. 01-653). (mpt) [00-1402 00-1403]
11/8/01	LETTER dated 10/22/01 received from Clerk's Office, S. Ct., advising that petition for a writ of certiorari was filed 10/19/01 and docketed on 10/19/01 as (S. Ct. No. 01-654). (mpt) [00-1402 00-1403]
11/8/01	LETTER dated 10/23/01 received from Clerk's Office, S. Ct., advising that petition for a writ of certiorari filed 10/19/01 and docketed on 10/22/01 as (S. Ct. No. 01-657). (mpt) [00-1402 00-1403]
2/5/02	PETITION filed (5 copies) by Intervenor Cellco Prtnshp in 00-1402 (certificate of service dated 2/5/02) to enforce the mandate. [00-1402, 00-1403] (mam) [00-1402 00-1403]
2/15/02	OPPOSITION (styled "opposition to Verizon's [Cellco] petition to enforce mandate") filed [659893-1] (5 copies) by Respondent FCC to petition to enforce mandate. 00-1402 (certificate of service dated 2/15/02) (mam) [00-1402]

DATE	PROCEEDINGS
2/15/02	OPPOSITION filed [659899-1] (5 copies) by Intervenor Arctic Slope Regn in 00-1402 (certificate of service dated 2/15/02) to petition to enforce mandate. (mam) [00-1402]
2/15/02	ENTRY OF APPEARANCE filed by Attorney Jonathan Saul Franklin for Intervenor Cncl Tree Comm, Intervenor Arctic Slope Regn in 00-1402, Michele Clause Farquhar for Intervenor Cncl Tree Comm, Intervenor Arctic Slope Regn in 00-1402 [659910-1]. (mam) [00-1402]
2/20/02	LETTER dated 2/15/02 received from S. Ct. Clerk's Office transmitting copy of motion to dismiss petition for writ of certiorari and 2/15/02 S. Ct. order dismissing petition pursuant to Rule 46.2 of the Rules of the Supreme Court. [661606-1] [00-1402, 00-1403] (mam) [00-1402 00-1403]
2/22/02	SUPPLEMENT (amended certificate of service) [661496-1] to opposition [659893-1] lodged by Respondent FCC in 00-1402. (mam) [00-1402]

DATE	PROCEEDINGS
2/22/02	MOTION filed (5 copies) by Respondent FCC in 00-1402 (certificate of service dated 2/22/02) for leave to file [661499-1] a supplemental document (amended certificate of service) [661496-1]. (mam) [00-1402]
2/22/02	REPLY filed [661511-1] (5 copies) by Intervenor Cellco Prtnshp in 00-1402 (certificate of service dated 2/22/02) to opposition to petition to enforce mandate. (mam)
3/1/02	CLERK'S ORDER filed[662127] granting motion leave to file to file amended certificate of service to its opposition to petition to enforce the mandate [661499-1]. The Clerk is directed to file the lodged document. [Entry Date: 3/1/02] [00-1402, 00-1403] (mcm0 [00-1402 00-1403]
3/1/02	PER ABOVE ORDER lodged supplemental document [661496-1] in 00- 1402 is filed. [00-1402, 00-1403] (mcm) [00-1402 00-1403]

DATE	PROCEEDINGS
3/1/02	PER CURIAM ORDER filed [662132] denying petition enforce mandate [656520-1] filed by cellco Prtshp. The relief sought by the petition does not fall within the court's mandate. Accordingly, the court has not reached the substantive merits of the petition. Before Judge Sentelle, Tatel, Garland. [Entry Date: 3/1/02] [00-1402, 00-1403]
3/8/02	LETTER dated 3/8/02 rec'd from Clerk of the Supreme Court [664591-1] (Sumpreme Court No. 01-653). The motion of Urban Comm-North Carolina, Inc., for leave to file a brief as amicus curiae is granted. The petition for writ of certiorari is granted. The cases are consolidated and a total of one hour is allotted for oral argument. Certificate of service by mail dated 3/4/02. (Lme) [00-1402]
3/8/02	LETTER dated 03/04/02 rec'd from Clerk of the Supreme Court [664600-1] (Supreme Court No. 01-657). The petition for a writ of certiorari is granted. The cases are consolidated and a total of one hour is allotted for oral argument. Certificate of service by mail dated 3/4/02. (Lme) [00-1402]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOCKET NO. 00-1403

NEXTWAVE PERSONAL COMMUNICATIONS, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
RESPONDENTS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/15/00	NOTICE OF APPEAL CASE docketed. Notice of Appeal filed byAppellant Next-Wave Power Prt. [545017-1] (lme) [00-1403]
9/15/00	STATEMENT filed by Appellant Next-Wave Power Prt pursuant to FRAP 26.1 providing corporate disclosure listing [545051-1] Certificate of Service date 9/15/00 (lme) [00-1403].
9/21/00	CLERK'S ORDER filed to consolidate cases [545165-1]. [Entry Date: 9/21/00] [00-1402, 00-1403] (lme) [00-1402 00-1403]

[Cases consolidated. *See* Docket No. 00-1402.]

B10 (Official Form 10)
(Rev. 7/95)

United States Bankruptcy Court Southern District of New York	PROOF OF CLAIM
In re (Name of Debtor) Nextwave Personal Communications, Inc. and Nextwave Power Partners, Inc.	Case Number 98B21529 (ASH) Jointly Administered

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor (The person or other entity to whom the debtor owes money or property) United States of America	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. ☐ Check box if you have never received any notices from the bankruptcy court in this case. ☐ Check box if the address differs from the address on the envelope sent to you by the court.
Name and Address Where Notices Should be Sent SEE ATTACHMENT "A" Telephone No. SEE ATTACHMENT "A"	THIS SPACE IS FOR COURT USE ONLY
ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR: SEE ATTACHMENT "B"	Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated:_____

1. BASIS FOR CLAIM
- ☐ Goods sold
- ☐ Services performed
- ☐ Money loaned
- ☐ Personal injury/wrongful death
- ☐ Taxes
- ☒ Other (Describe briefly)

Conditional grant of licenses to operate broadband personal communications services and related notes.

- ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
- ☐ Wages, salaries, and compensation (Fill out below)

Your social security number_____
Unpaid compensation for services performed from_____ (date) to_____ (date)

2. DATE DEBT WAS INCURRED
SEE ATTACHMENT "B"

3. IF COURT JUDGMENT, DATE OBTAINED:

4. CLASSIFICATION OF CLAIM. Under the Bankruptcy Code all claims are classified as one or more of the following: (1) Unsecured nonpriority, (2) Unsecured Priority, (3) Secured. It is possible for part of a claim to be in one category and part in another.
CHECK THE APPROPRIATE BOX OR BOXES that best describe your claim and STATE THE AMOUNT OF THE CLAIM AT TIME CASE FILED.

☒ SECURED CLAIM $ 4,771,473,668.78 plus attorney fees & costs
Attach evidence of perfection of security interest
Brief Description of Collateral: ☐ Real Estate ☐ Motor Vehicle ☒ Other (Describe Briefly) SEE ATTACHMENT "C"
Amount of arrearage and other charges at time case filed included in secured claim above, if any $_____

☐ UNSECURED NONPRIORITY CLAIM $_____
A claim is unsecured if there is no collateral or lien on property of the debtor securing the claim or to the extent that the value of such property is less than the amount of the claim.

☐ UNSECURED PRIORITY CLAIM $_____
Specify the priority of the claim.

- ☐ Wages, salaries, or commissions (up to $4000),* earned not more than 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier—11 U.S.C. § 507(a)(3)
- ☐ Contributions to an employee benefit plan—11 U.S.C. § 507(a)(4)
- ☐ Up to $1,800* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use—11 U.S.C. § 507(a)(6)
- ☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child—11 U.S.C. § 507(a)(7)
- ☐ Taxes or penalties of governmental units—11 U.S.C. § 507(a)(8)
- ☐ Other—Specify applicable paragraph of 11 U.S.C. § 507(a)_____

*Amounts are subject to adjustment on 4/1/98 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

5. TOTAL AMOUNT OF CLAIM AT THE TIME CASE FILED: $_____ (Unsecured) $_____ (Secured) $_____ (Priority) $_____ (Total)

☐ Check this box if claim includes charges in addition to the principal amount of the claim. Attach itemized statement of all additional charges.

6. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor.

7. SUPPORTING DOCUMENTS: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. If the documents are not available, explain. If the documents are voluminous, attach a summary.

8. TIME-STAMPED COPY: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

THIS SPACE IS FOR COURT USE ONLY

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any)
12/16/98	Thomas M. Hellman, Deputy CFO

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

ATTACHMENT A

Notices should be sent to the following:

Daniel S. Alter
Edward A. Smith
Assistant United States Attorneys
Southern District of New York
100 Church Street, 19th Floor
New York, NY 10007

Stewart A. Block
David E. Horowitz
Office of General Counsel
Federal Communication Commission
445 12th Street S.W., 8th Floor
Washington, DC 20024

ATTACHMENT B

Debtor Nextwave Personal Communications Inc. became obligated to pay the winning bid price for each "C block" license for which it was the high bidder as of the date the C block auction closed on May 6, 1996, as set forth in the attached Public Notice. DA-96-716 (May 8, 1996). *See* 47 C.F.R. §1.2104(g)(2)(1996).

Debtor Nextwave Personal Communications Inc. became obligated to pay the winning bid price for each "C block" license for which it was the high bidder as of the date the C block "re-auction" closed on July 16, 1996, as set forth in the attached Public Notice. DA-96-1153 (July 17, 1996). *See* 47 C.F.R. §1.2104(g)(2)(1996).

Debtor Nextwave Power Partners, Inc. became obligated to pay the winning bid price for each "F block" license for which it was the high bidder as of the date the F block "re-auction" closed on January 14, 1997, as set forth in the attached Public Notice. DA-97-81 (January 15, 1997). *See* 47 C.F.R. §1.2104(g)(2)(1996).

The foregoing obligations so incurred were subsequently memorialized by the orders conditionally granting Debtors certain licenses, the condition on the face of the Licenses, and the Promissory Notes and Security Agreements executed by the Debtors, each of which is set forth in Attachment C. The Licenses, Promissory Notes and Security Agreements are submitted in this Proof of Claim only for the purpose of further memorializing the pre-existing obligations incurred at the close of the respective C block auction, C block re-auction, and F block auction as set forth above.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case Nos. 00-1402; 00-1403

NEXTWAVE PERSONAL COMMUNICATIONS INC. AND NEXTWAVE POWER PARTNERS INC., APPELLANTS/PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, APPELLEES/RESPONDENTS

DECLARATION OF FRANK A. CASSOU IN SUPPORT OF NEXTWAVE'S MOTION FOR A STAY PENDING JUDICIAL REVIEW OR FOR EXPEDITED CONSIDERATION

Frank A. Cassou, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am the Executive Vice President of Corporate Development and General Counsel of NextWave Personal Communications Inc., NextWave Partners Inc., NextWave Power Partners Inc., NextWave Wireless Inc., and NextWave Telecom Inc. (collectively, "NextWave"). I have served in this capacity since February 1996. Prior to joining NextWave, I was partner at the law firm of Cooley Godward Castro Huddleson and Tatum, where I represented telecommunications and technology companies for thirteen years.

2. As the Executive Vice President of Corporate Development and General Counsel of NextWave, I am familiar with and knowledgeable about the wireless industry and the business needs of NextWave.

3. I am submitting this declaration in support of the Motion of NextWave Personal Communications Inc., et al., for a Stay Pending Judicial Review of the order of the Federal Communications Commission (the "FCC" or the "Commission") denying NextWave's petitions for reconsideration of the cancellation of its licenses.

4. At the outset, it is important to understand the events preceding NextWave's filing of a bankruptcy petition of June 8, 1998. Originally formed in early 1995, following conclusion of the C Block auctions in 1996, NextWave epitomized the type of enterprise Congress envisioned when it provided for portions of the electromagnetic spectrum to be reserved for small businesses and entrepreneurs. Begun by a group of telecommunications executives, who included pioneers in wireless technological advancements, NextWave had flourished to become a substantial company that was aggressively building out its network and implementing a nationwide business plan.

5. The way the C Block Auction was set up, bidders had to be small companies (gross revenues of not more than $125 million in each of the preceding two years and total assets of not more than $500 million), but they also had to prove their financial capability to bid. To qualify to submit bids, prospective bidders had to deposit funds with the FCC to establish eligibility.

6. On December 1, 1995, NPCI deposited $79,225,000 with the FCC, qualifying it to submit bids

at the C block Auction for up licenses covering up to 180 million POPs.

7. At the conclusion of the C Block Auction, NextWave was declared high bidder for 63 licenses with a total bid amount of $4.74 billion. High bidders were required to place 5% cash deposits with the FCC within 5 days of being declared high bidder with an additional 5% due upon license grant.

8. NextWave's bids were in line with spectrum values implied by publicly traded comparables at the time, such Omnipoint Corporation.

9. Based in no small part on the market's excitement about NextWave's prospects and satisfaction with the value of the licenses NextWave bid for, NextWave succeeded in raising over $600 million to fund the amounts due the FCC and commence building of the network.

10. Having raised over $600 million, NextWave proceeded to arrange for the rest of the financing necessary to complete the buildout of its network. While several major Wall Street investment banks competitively sought the job of permanently financing the Company, the Company ultimately selected Merrill Lynch and Lehman Brothers to lead the Company's public financing efforts. These investment banks proceeded rapidly with the financing efforts, including filing documents with the SEC for such financing in June 1996.

11. Immediately following the C Block Auction, NextWave began the process of building out its network. As indicated above, the Company invested over $600 million in acquisition of its licenses and the build-out of its network. By early 1997, the Company's

payroll had grown to over 350 full-time employees and almost 300 contractors. NextWave recruited a team of seasoned and experienced executives from the telecommunications industry to build out of its wireless network, and established a blue chip Board of Directors. The team of NextWave founders also brought a demonstrated track record in establishing successful wireless businesses, as evidenced by their participation in the development and commercialization of CDMA, the leading digital technology used today in U.S. cellular and PCS wireless networks. The Company established 22 office locations around the country.

12. By mid-1997, NextWave was ready with 90% of the microwave links needed for the initial launch of service, had identified and pre-qualified thousands of cell sites, and had acquired seven switch sites. In total, more than 1,300 cell sites had been designed, over 300 site leases signed, and another 900 leases negotiated, with over 30% ready for build-out. NextWave was well underway toward putting its spectrum into immediate use.

13. NextWave expected an initial launch of commercial service in four markets by late 1997, including Washington, D.C., San Diego, Las Vegas and San Antonio markets where the Company had installed and operated network trial systems. In all, NextWave's team of over 100 engineers completed network engineering designs for 22 of NextWave's major markets, including New York, Los Angeles, Chicago, Washington/Baltimore and Boston, representing a total of 100.5 million POPs, or approximately 62% of the NextWave footprint.

14. To support these efforts, NextWave secured in excess of $2 billion of vendor financing commitments

from major equipment vendors, such as Lucent Technologies, Hughes Network Sysems, Nortel Networks, and LG InfoComm, and entered into agreements to sell in excess of 35 billion minutes of use to telecommunications carriers such as MCI, which alone committed to purchase in excess of 10 billion minutes of use.

15. During the latter part of 1996 and early 1997, the market value of spectrum literally cratered. Starting in August 1996, the FCC auctioned an additional 1500 licenses concluding in early 1997. This flooding of the market led to dramatically depressed prices for licenses - less than 25% of the amounts bid in the C Block Auctions. Essentially overnight, C Block companies (including NextWave) went from being the "darlings" of Wall Street (over $1.6 billion in registration statements backed by major investment banks were on file) to the brink of insolvency.

16. When the NextWave's licenses were finally awarded in January 1997, the market was not willing to finance them. In his separate statement to the FCC's September 1997 restructuring order, former FCC Chairman Reed Hundt stated that he "was aware last December [1996] that the market was unlikely to finance many of the largest bidders." Thus, the Commission knew of the effect of its D, E and F auction on the new entrepreneurial companies' ability to raise financing prior to the time that it finally granted NextWave its licenses in January 1997.

17. By making its $500 million down payment to the FCC in January 1997, NextWave did so in full expectation of getting fully financed and honoring its original bid terms. At the time of the bids, NextWave expected that its licenses would be granted promptly and that spectrum values would not collapse. The

Company could not have anticipated, or planned, the delay in its license grants or the decline in spectrum values.

18. However, despite the PCS market crash, NextWave did not give up. From September 1997 through June 1998, the Company retained Prudential Securities, and engaged in extensive efforts to raise financing to fund one of the FCC's restructuring options. The Company proposed and discussed multiple footprint scenarios under the FCC options, ranging from 53 million POPs to 124 million POPs. The Company worked with at least six different major telecommunications players to try to derive a financial alternative.

19. At the same time that NextWave and other C block licenses were seeking to finance one of the proposed restructuring options, in March 1998 the FCC announced a deal in the Pocket bankruptcy that provided for a 60% reduction in the purchase obligation for licenses acquired by Pocket and the extension of the installment period to 12 years from 10 years. The market could not reconcile the disparity in treatments, and the FCC's willingness to accept payments at 40 cents on the dollar further eroded the markets assessment of spectrum values. Ultimately, each prospective investor contacted by NextWave and its investment bankers determined the market value of spectrum had simply fallen too low.

20. During this period, the Company entered into approximately 220 settlement agreements with various vendors and arranged for negotiated payments of over millions of dollars in outstanding obligations. As the Company's financial condition continued to deteriorate and early payments were missed, an increasing number

of creditors threatened or initiated litigation. Employees were asked to skip payroll on several occasions.

21. In February and March 1998 one of the Company's investors, Triumph Capital, made two emergency loans totaling $2 million. During February and March 1998, the Company's CEO advanced an additional $450,000. The Company ended February and March with available cash of $85,000 and $112,000 respectively.

22. Between March and October of 1997, the second and third largest C Block bidders filed for bankruptcy. NextWave, however, continued to try to find an alternative. Unlike those who declared bankruptcy in 1997, NextWave sought to stave it off and to continue to build-out its network. Only after fighting bankruptcy for many months, at the cost of millions of dollars to its officers and shareholders, did NextWave file Chapter 11 protection on June 8, 1998. NextWave did so for the same reason any other enterprise does so: to preserve its assets, reorganize, and emerge as a healthy entity. NextWave was forced to curtail its operations, lay off over 500 employees and contractors.

23. When a company files for bankruptcy, it loses all autonomy of operations. The Company becomes completely subject to the review and monitoring of the Court and the US Trustee. Its Board of Directors assumes the role of a trustee and must act as a fiduciary to all constituents. In bankruptcy, the Company's creditors assume an elevated role of involvement in the Company's affairs and activities due to their priorities over equity investors. NextWave, like any other company, had the strongest aversion to filing for Chapter 11 because of the complications and loss of control that accompany a bankruptcy filing. However,

once a company becomes insolvent, the Board of Directors has a fiduciary duty to protect the Company's assets, and bankruptcy is the process that Congress has created for companies to seek protection from creditors while it reorganizes its affairs.

24. At the time it sought protection under the Bankruptcy Code, NextWave had demonstrated its ability to acquire substantial sums of capital by raising over $600 million of working capital (of which $504 million was paid to the FCC) and by securing over $2 billion in financing from the Company's equipment vendors, and had built a world class organization of executives and employees from the wireless industry that, with the help of an additional 300 contractors, was fully engaged in the build-out and deployment of a wireless cellular telephone system in major cities across the country. NextWave had established exactly the type of business operation and resources that the Bankruptcy Code was designed to protect and preserve as it reorganized through a period of financial difficulty.

25. The FCC is the largest creditor in the NextWave bankruptcy and filed a claim in the bankruptcy for the full amount of the indebtedness. Under the bankruptcy laws, creditors are only allowed to receive the amount of their claim for which the Company received actual value. Creditors cannot claim a larger share of a company's assets based on inflated claims. Upon the filing of a petition for protection under the bankruptcy laws, NextWave assumed the statutory role of debtor-in-possession, charged with the responsibility to ensure that creditor claims are valid and represent amounts for which the Company received equivalent value. Concurrent with the filing of its bankruptcy petition, NextWave (following the pre-

cedent of General Wireless) commenced a fraudulent conveyance action against the FCC to challenge the FCC's claim. Pursuant to § 544 of the Bankruptcy Code, NextWave sought to have the amount of its debt to the FCC adjusted to the value of the licenses when the licenses were granted and the debt incurred.

26. From that point on, NextWave's bankruptcy proceeded on a dual track. NextWave litigated with the FCC on one front. On the other front, NextWave struggled to hold its business together to reorganize. Holding employees, negotiating a plan with creditors and raising financing for a plan were the major focus on the business side of the bankruptcy.

27. From the latter half of 1998 through the fall of 1999, NextWave litigated with the FCC. An extensive trial occurred before the bankruptcy court followed by an expedited appeal to first the District Court and then the Second Circuit Court of Appeals. While successful at the trial and first appellate level, in November 1999 the Second Circuit announced, without decision, that it was reversing the lower courts.

28. As a result of NextWave's extensive financing efforts, aided substantially by the recovery of market conditions, NextWave raised sufficient capital to pay in full for its Licenses emerge from bankruptcy, and proceed expeditiously to offer its PCS network to customers. On December 16, 1999, NextWave filed a modified plan of reorganization providing, *inter alia*, that all creditors, including the FCC, would be paid in full.

29. On December 22, 1999 the Second Circuit issued its opinion revealing that the ground for its reversal was, *inter alia*, that only the D.C. Court of Appeals had jurisdiction to review the FCC's regulatory actions.

30. On January 11, 2000, in effort to avoid further litigation, NextWave submitted an enhanced proposal to the FCC, offering to satisfy all present *and future* obligations to the FCC through a lump sum cash payment in excess of $4.3 billion upon confirmation of the plan.[1]

31. Notwithstanding NextWave's ability and willingness to satisfy its full bid price obligations, on January 12, 2000 - only one day after NextWave's lump sum offer, and a mere nine days before scheduled plan confirmation - the FCC objected to confirmation. The FCC asserted *for the first time* that NextWave's Licenses "automatically canceled" at an unspecified date more than a year before - a full eleven months prior to the Second Circuit's December 22 decision - ostensibly because NextWave had not made timely interest payments during the pendency of its bankruptcy case. The FCC issued that same day a Public Notice purporting to cancel and to designate for reauction NextWave's C and F Block licenses. If this FCC order is not reviewed prior to the scheduled reauction of NextWave's licenses on December 12, 2000, or is not stayed pending a final disposition of its legality, NextWave's business will face liquidation, causing irreparable injury.

32. The licenses at issue here represent NextWave's principal assets. Indeed spectrum licenses constitute the principal assets of any wireless company. Without such licenses, wireless companies cannot provide ser-

[1] The $4.3 billion payment, together with the $505 million of license payments already made by NextWave, includes interest-on-interest and would total in excess of $4.8 billion, making it the largest payment ever made by a company to the United States government for any spectrum auction held to date.

vice to customers. Simply put, spectrum licenses are essential to the life of any wireless company, NextWave included. Thus, if NextWave loses its licenses, NextWave will be destroyed as a business. Failure to ensure review of the FCC's actions prior to the reauction, in this instance, is literally a corporate death penalty. No greater harm to a company is possible.

33. In addition, absent prompt review or a stay of the FCC's order, NextWave will be at serious risk of failing to achieve the financing necessary to continue its business. Nor will NextWave be able to retain the personnel and expertise essential to its business operations. Thus, the Company will face liquidation without ever receiving the opportunity to litigate fully its claims against the FCC.

34. Other parties will be harmed as well by the destruction of NextWave's business—its investors, employees, creditors, and customers. If a stay of the FCC's order is not granted, NextWave's investors and creditors, will be at serious risk of forfeiting most, if not all, of the more than $600 million dollars in debt and equity they invested in the Company, and NextWave's employees will lose their livelihoods. In addition, the Company's lead post-petition lender, D&P NextWave Partners, L.P. ("DIP lender"), which invested approximately 35 million dollars in NextWave to enable NextWave's business operations to continue, will face a serious risk of not being repaid if NextWave's licenses are revoked.

35. The injury to NextWave and the larger community is particularly stark here. NextWave has filed a plan of reorganization and assembled in excess of $5 billion of financing, which will allow it to pay all of its creditors in full, including the FCC, and emerge from

bankruptcy. NextWave is poised to pay its creditors and emerge from bankruptcy once the FCC's efforts to seize NextWave's licenses cease. If the FCC's re-auction is permitted to go forward and NextWave loses its licenses, however, Nextwave's promising Chapter 11 reorganization will fail, resulting in a liquidation. NextWave's creditors, who would have otherwise received ample compensation for their claims for their claims, will get little or nothing.

36. In addition, the general public would also benefit from issuance of a stay. In directing the FCC to design a system of competitive bidding for spectrum licenses, Congress emphasized that the public interest demanded "the development and rapid deployment of new technologies" and the "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3). NextWave, which has already completed much of the necessary network design and preparation, is in a position to fulfill the congressional goal of prompt and efficient use of the spectrum.

37. Finally, during the period between NextWave's filing for bankruptcy and the FCC's January 12, 2000 order, the FCC took numerous actions that confirm its understanding that its own regulations did not require NextWave to make installment payments while in bankruptcy. Most importantly, throughout the NextWave bankruptcy proceedings, the FCC repeatedly assured NextWave and its creditors in court filings and in court statements that NextWave would be protected from collection of its C block license obligations while it reorganized its business. Further, despite the FCC's issuance of revised C Block promissory notes to licensees, and its general practice of sending PCS licensees quarterly payment notices—which, among other things,

specify the balance due on the debt and the amount of payment to be made, and remind the parties of the timing of their payment obligations—the FCC never sent NextWave any such revised notes or notices of upcoming payments after NextWave filed for bankruptcy on June 8, 1998.

38. NextWave and its investors and creditors relied to their detriment on the FCC's representations that the automatic stay applied to the FCC until it was lifted and that NextWave's licenses had not cancelled. In addition, the DIP lender relied on the FCC's representations in agreeing to advance an additional $10 million of post-petition financing to NextWave, which was approved by the bankruptcy court on November 16, 1999 (almost 11 months after the FCC now claims NextWave's licenses purportedly cancelled). Quite simply, NextWave and its investors and creditors have acted in justifiable reliance on the FCC's representations that the licenses had not cancelled—justifiable reliance that will be betrayed if the FCC's order purporting to cancel the licenses is not stayed.

39. Throughout the course of its reorganization efforts, NextWave strictly adhered to the dictates of applicable federal law, relying on the protections provided under federal bankruptcy statutes, the representations of the FCC in federal courts, and the rulings of federal courts, in the discharge of its payment obligations to the FCC and the Company's other creditors. After filing its bankruptcy case, NextWave was required under applicable bankruptcy law to suspend all payments to creditors, including payments to the FCC. The Bankruptcy Code in fact prohibits a debtor from making payments on pre-petition claims to a select creditor or creditors without specific judicial authori-

zation. NextWave was in fact advised of this by the bankruptcy court having jurisdiction over our case: "any unauthorized post-petition payments to the FCC on account of its pre-petitioner claim would be avoidable at the instance of the debtors or other creditors as an unauthorized post-petition transfer under Section 549."

40. Having taken the position that NextWave's licenses would not cancel because of any failure to make a payment that the Bankruptcy Code prohibits, the FCC altered its position after the fact and claimed that NextWave's licenses had, in fact, cancelled for non-payment after all. The Company was ambushed by the FCC's stunning reversal. The FCC's announcement that NextWave's licenses would be cancelled for non-payment of interest during the bankruptcy came for the first time nearly 30 days after the Company submitted a plan of reorganization that would pay the FCC obligations in full. NextWave was never given a chance to cure its obligations. The Company could not be expected to do anything different than comply with federal statutes in exercising its duties and obligations. Yet the FCC seeks to retroactively destroy NextWave for this compliance.

41. The FCC was unambiguous in its declarations that NextWave would be able to pursue reorganization under the bankruptcy laws. In reliance on those assurances and meeting the goals and purposes of the bankruptcy code, NextWave has successfully reorganized its business and filed a plan of reorganization under which NextWave assembles in excess of $5 billion of financing. This plan allows the Company to pay all of its creditors in full, including the FCC, and enables the Company to emerge from bankruptcy to buildout its wireless

networks and bring commercial service to consumers. The plan preserves jobs, preserves assets, rehabilitates the business, and pays all creditors in full. Few bankruptcies achieve such a result of full satisfaction of all creditors – the Bankruptcy Code is designed to protect and foster the opportunity to achieve such a result.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Sept. 19, 2000.

/s/ FRANK A. CASSOU
FRANK A. CASSOU

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

98 B 21529 (ASH)
Chapter 11

IN RE: NEXTWAVE PERSONAL COMMUNICATIONS, INC., ET AL., DEBTORS

Hearing Date: January 21, 2000
11:00 a.m.

OBJECTION OF FEDERAL COMMUNICATIONS COMMISSION TO DEBTORS' MODIFIED FIRST AMENDED JOINT PLAN OF REORGANIZATION

The Federal Communications Commission ("FCC") respectfully objects to the Modified First Amended Joint Plan of Reorganization ("Modified Plan") proposed by debtors NextWave Personal Communications, Inc., *et al.* ("Debtors"), in the above-captioned, jointly administered bankruptcy case. The Modified Plan cannot be confirmed because it is predicated upon the Debtors retention of C and F block Personal Communication Services ("PCS") spectrum licenses, which, in 1997, the FCC granted to NextWave Personal Communications, Inc. ("NPCI") and NextWave Power Partners, Inc. respectively. As a consequence of the Debtors' failure to comply with the terms and conditions of those authorizations, however, the Debtors' C and F block PCS licenses automatically canceled no

later than January 1999.* Annexed hereto as Exhibit A is a copy of the Public Notice released by the FCC on January 12, 2000, reflecting the automatic cancellation of the Debtors' C and F block PCS licenses.

* * * * *

In light of the Second Circuit's ruling, it is clear that the Debtors' C and F block PCS licenses automatically canceled pursuant to the terms and conditions upon which they were granted. Given that a licensee's failure to comply with a license's full and timely payment condition automatically results in the termination of a spectrum authorization, requiring no affirmative steps by the FCC, *see* 47 C.F.R. § 1.2110, and because the events of regulatory default occurred in this case after the Debtors filed their bankruptcy petition, the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362, are not implicated by the cancellation of the Debtors' C and F block PCS licenses.

* * * * *

* The applicable terms and conditions of the licenses are set forth in, and established by, 47 C.F.R. §§ 1.2110, 24.711, and the FCC's ruling *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of Second Report and Order*, 13 F.C.C. Rcd. 8345 (Mar. 24, 1998), 1998 WL 130176 (F.C.C.); *In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments*, 13 F.C.C. Rcd. 22071 (Oct. 29, 1998), 1998 WL 754808 (F.C.C.) ("*Non-Delinquency Order*"); and *Order on Reconsideration of the Non-Delinquency Order*, 14 F.C.C. Rcd. 6080 (April 2, 1999), 1999 WL 181805 (F.C.C.).

Dated: New York, New York
January 12, 2000

MARY JO WHITE
United States Attorney for the
Southern District of New York
Attorney for Federal Communications
Commission

By: /s/ DANIEL S. ALTER
DANIEL S. ALTER (DA-7158)
Assistant United States Attorney
100 Church Street, 19th Floor
New York, New York 10007
Tel. No.: (212) 637-2741

[SEAL OMITTED]

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

June 9, 1997

The Honorable W.J. (Billy) Tauzin
Chairman
Subcommittee on Telecommunications,
Trade, and Consumer Protection
Committee on Commerce
U.S. House of Representatives
316 Ford House Office Building
Washington, D.C. 20515-6115

Dear Chairman Tauzin:

I am writing regarding the Committee draft of the proposed Reconciliation legislation. I applaud your efforts to undertake the extremely difficult task of reconciling budget and telecommunications policy. We have provided preliminary comments to your staffs. I would like to take this opportunity, however, to comment on a few specific provisisions.

First, the draft requires the commission to identify 100 megahertz of new spectrum below 3 GHz for auction. Our engineers, in an extended effort, have been unable to identify that amount of spectrum below 3 GHz which could be auctioned for significantly more valuable uses, including the cost of relocation of incumbent licensees. Even if the 45 MHz between 1710-1755 Mhz that is identified in the Committee's draft can be counted towards the 100 MHz by accelerating its assignment to commercial users, I am concerned that it

will be extremely difficult for the FCC to identify an additional 55 megahertz of spectrum.

Second, in the provision that would cease analog television service by 2007, the requirement that the Commission grant extensions in markets where more than 5 percent of households still rely on over-the-air analog signals will increase uncertainty, undermine incentives for the rapid deployment of digital television, and result in inefficient licensing of the analog spectrum. The uncertainty created by such mandatory license extensions could discourage potential future users from bidding for this spectrum. In this regard, it is essential to establish a date certain by which future licensees can plan to have use of the analog channels targeted for return. Our goals of efficient spectrum management would be undermined by indefinitely tying up spectrum held by analog licensees.

Third, the provision in the draft giving the Commission the option of allocating "up to" 24 megahertz of spectrum, as opposed to directing the Commission to allocate the full 24 megahertz of spectrum to public safety entries, is contrary to the well-established need identified by the Public Safety Wireless Advisory Committee (PSWAC). As you know, the Public Safety community has identified very serious short and long term spectrum needs. By providing for allocation of less than the full 24 MHz of spectrum between channels 60-69 for public safety, the draft potentially undercuts the spectrum needs identified by the PSWAC. The legislation should specify that the Commission reallocate 24 MHz for public safety.

I would also like to recommend some additional provisions that should be considered for inclusion in the final version of this legislation. First, in order to protect

the government's interest in spectrum licenses, it would be good to give the Commission explicit authority to revoke and reauction licenses held by firms that have gone into bankruptcy. The Commission should be given the explicit authority to revoke and reauction licenses notwithstanding the automatic stay provisions of the bankruptcy code. We are developing language, which we would be happy to share. Second, the spectrum reallocated from federal users should be limited to spectrum that is currently allocated on an exclusive basis for federal use. Shared or heavily encumbered spectrum is of much less value for the development of new commercial services. Third, spectrum to be transferred from federal users needs to be available for non-government use on an exclusive basis. Fourth, in order to speed the development of spectrum by non-government users, the bill should permit the direct reimbursement of displaced Federal users in a manner similar to the reimbursement private relocated users receive, and require federal users to vacate the spectrum if provided equivalent replacement capability.

As this measure progresses, I look forward to working with you and your staff on these and other concerns so that a bill can be fashioned that truly serves the public interest regarding spectrum policy.

Sincerely,

/s/ REED HUNDT
REED HUNDT
Chairman

cc: The Honorable Tom Bliley, Chairman, Committee on Commerce
The Honorable John D. Dingell, Ranking Minority Member, Committee on Commerce
The Honorable Edward J. Markey, Ranking Minority Member, Subcommittee on Telecommunications, Trade, and Consumer Protection

[SEAL OMITTED]

FEDERAL COMMUNICATION COMMISISION
Washington, D.C. 20554

September 3, 1999

Cady Thomas
Office of the Honorable Senator Jesse Helms
403 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Ms. Thomas

I am writing in reply to Senate Helms' letter to Sheryl J. Wilkerson of the Federal Communications Commission on June 30, 1999, forwarding a letter from Urban Communicators PCS Limited Partnership ("UrbanComm").

As UrbanComm's letter reflects, that firm is now in litigation with the FCC in bankruptcy court in the Southern District of New York. In light of the pending litigation, it would not be appropriate for the FCC to respond to the statements made by UrbanComm about the merits of the litigation, except to say that the FCC has filed a motion to dismiss the litigation that is now pending before the bankruptcy court.

UrbanComm's letter also expresses concerns about Section 618 in S. 1217, which has passed the Senate, Cong. Rec. S9434 (July 27, 1999), and is now awaiting conference. Section 618 would amend Section 309(j) of the Communications Act, which authorizes the FCC to use competitive bidding for the assignment of radio spectrum.

Subparagraph (i) of the amendment assures that the FCC will be able to enforce its existing spectrum auction regulations enabling the FCC to recover licenses for a new auction if a licensee fails to meet its installment payment obligations.

Subparagraph (ii) allows the FCC to avoid the jurisdictional and administrative burden associated with obtaining a perfected security interest under state law for each FCC license for which installment payments are owed.

Subparagraph (iii) makes Section 618 retroactive to include all pending cases that are non-final decisions (*i.e.*, subject to further appellate review in the courts.)

This proposal has been included in the last two budget submissions by the President and is supported by the Department of Justice. The purpose of Section 618 is to protect the interest of the American taxpayers. It assures that companies which are awarded FCC licenses at a competitive auction pursuant to Section 309(j) will in fact pay their winning bid amounts, and will not be able to use the bankruptcy courts to reduce their promised payments to the United States Treasury.

A licensee that is not in default will not be affected by Section 618. Nor will Section 618 affect licensees that are in bankruptcy but which do not seek to use the Bankruptcy Code to reduce their payment obligations to the Treasury.

An FCC license is a valuable public asset that is entrusted to licensees to use in the public interest. If licensees are permitted to use Bankruptcy Code or other state or federal laws to avoid the amount they bid

while retaining the license, then the FCC auction process created by Congress in Section 309(j) cannot function as Congress envisioned. *Section 618 does not give new regulatory powers to the FCC, but only assures that existing regulations will be applied fairly to all licensees.*

Legislation protecting the interests of the United States as a creditor in bankruptcy cases is not unusual. Congress has enacted many specific provisions protecting other important governmental lending and licensing programs in bankruptcy court:

- debts for repayment of Health Education Assistance Loans – 42 U.S.C. § 2921(g);
- debts for repayment of special retention pay for medical and dental military officers that do not fulfill their service - 37 U.S.C. § 302;
- HUD mortgages - 11 U.S.C. § 362(b)(8);
- ship mortgages held by the Secretary of Commerce or Secretary of Transportation under the Merchant Marine Act - 11 U.S.C. §§ 362 (b)(12) & (13);
- debts for taxes and customs duties - 11 U.S.C. §§ 523 (a)(1) and 523 (a)(14)
- licensure of educational institutions - 11 U.S.C. §§ 362 (b)(14) & (15);
- financial commitments to a Federal depository institution's regulatory agencies (*e.g.* FDIC, OTS) to maintain the capital of an insured depository institution - 11 U.S.C. §§ 365 (o) and 507(a)(9);

- governmental exercise of police and regulatory powers - 11 U.S.C. §§ 362 (b)(4).

Finally, UrbanComm's letter questioned the constitutionality of the retroactivity provision of Section 618. The Supreme Court has stated that Congress can constitutionally make legislation apply retroactively to pending cases, including cases on appeal. *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995). The retroactivity provision of Section 618 is drafted to conform to the limits set forth by the Supreme Court.

I trust that this response will answer the inquiry from your Office.

Very truly yours,

/s/ CHRISTOPHER J. WRIGHT
CHRISTOPHER J. WRIGHT
General Counsel

[SEAL OMITTED]

ONE HUNDRED SIXTH CONGRESS
CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
2135 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20315-8218
[NAMES AND ADDRESSES OMITTED]

May 12, 2000

The Honorable J. Dennis Hastert
The Speaker
U.S. House of Representatives
H232, The Capitol
Washington, DC 20515

Dear Mr. Speaker:

We are writing to express opposition to any effort to include legislation as part of the appropriations process that would - in effect - supersede the Bankruptcy Code and give the Federal Communications Commission special protections with respect to the treatment of certain spectrum licenses.

The Commercial and Administrative Law Subcommittee's April 11th hearing examined the FCC's contention that it is exempt from the automatic stay provision under section 362(b) of the Bankruptcy Code. Every member of the subcommittee present at the hearing expressed his concern or disagreement with the FCC's position that it is exempt from the automatic stay provision – a position contrary to congressional intent when it enacted section 362(b) in 1997.

As you may recall, the FCC has sought such legislative protection as part of the appropriations process since 1997. Proposed statutory language, for example, was included in the Administration's fiscal year 1999 and 2000 budget requests, and appeared in the Senate version of the Commerce, Justice, State, the Judiciary and related agencies appropriation bill for fiscal year 2000.

Based on jurisdictional and procedural grounds, we, the undersigned, have repeatedly objected to these prior legislative efforts. These prior proposals present serious substantive concerns. They conflict with one of the Bankruptcy Code's fundamental tenets that all similarly situated creditors be treated equally, absent significant public policy reasons warranting some form of preferred treatment (e.g., police and regulatory enforcement officials, spousal and child support claimants, victims of fraud). These proposals, however, would endow the FCC with more protections than virtually any other creditor, including the Internal Revenue Service, has under current bankruptcy law. They would exempt the FCC from the Bankruptcy Code's automatic stay provision, a provision to which the FCC is subject. If enacted, this proposed legislation could potentially destroy a debtor's prospect for economic rehabilitation and deprive creditors of a major source of repayment.

Notwithstanding the extraordinary ramifications of these FCC proposals, no compelling public policy has been articulated justifying such radical legislative relief. While governmental agencies (including the FCC) have issued statements citing anticipated pecuniary benefits of the legislation, these estimates are difficult to assess. In addition, any arguable financial

benefit of course must be carefully considered given the harm to other creditors that could result from enactment of this legislation.

For these reasons, we oppose the inclusion of such proposed legislation or any similar provision giving the FCC an exemption from the automatic stay provision by amending section 362(b), which does not exempt the FCC despite its claims to the contrary.

Sincerely,

/s/ HENRY J. HYDE
HENRY J. HYDE
Chairman

/s/ JOHN CONYERS, JR.
JOHN CONYERS, JR.
Ranking Member

/s/ GEORGE W. GEKAS
GEORGE W. GEKAS
Chairman, Subcommittee on Commercial and Administrative Law

/s/ JERROLD NADLER.
JERROLD NADLER
Ranking Member
Subcommittee on Commercial and Administrative Law

cc: The Honorable Richard K. Armey
The Honorable Richard A Gephardt
The Honorable C. W. Bill Young
The Honorable David R. Obey
The Honorable Harold Rogers
The Honorable Jose E. Serrano

[SEAL OMITTED] August 7, 1998

Ms. Magalie Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Rm. 222
Washington, DC 20554

Re: Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Service (PCS) Licenses WT Docket No. 97-82

Dear Ms. Salas:

Two of NextWave Telecom Inc.'s ("NextWave" or the "Company") subsidiaries were successful bidders in the Commission's C-block and D, E, and F-block auctions. As a result of the C-block auction and a subsequent licensing proceeding, NextWave Personal Communications Inc. ("NPCI") is a C-block PCS licensee in 63 Basic Trading Areas ("BTAs"). As a result of the D, E, and F-block auction and a subsequent licensing proceeding, NextWave Power Partners Inc. ("NPPI") is a D, E, and F-block PCS licensee in 32 BTAs. As the Commission is aware, NextWave has been attempting to arrange financing to complete the build out of these licenses.

On September 25, 1997, the Commission adopted its *Second Report and Order* in WT Docket No. 97-82, which reinstated broadband PCS C and F Block installment payments and, *inter alia*, provided C block licen-

sees with certain "restructuring" options.[1] On March 24, 1998, the Commission released its *Order on Reconsideration* of the order, which modified those options.[2] Pursuant to the *Order on Reconsideration*, June 8, 1998, was established as the deadline for receiving notifications by C-block licensees of which restructuring options they decided to elect (an "Election"). Subsequently, the FCC Wireless Telecommunications Bureau (the "Bureau") has permitted certain licensees to resubmit Elections that the Bureau determined were defective.[3] The Bureau also has granted various requests filed after June 8, 1998, concerning compliance with the June 8th notification deadline.[4]

On June 8, 1998, NPCI and NPPI, along with NextWave Partners Inc. and NextWave Wireless Inc. (the "Debtors") commenced chapter 11 cases in the United States Bankruptcy Court for the Southern District of New York, *see in re NextWave Personal Communication Inc.*, No. 98 B 21529 (ASH), and filed actions

---

[1] *See* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Second Report and Order*, 12 FCC Rcd 16,436 (1997) ("*Second Report and Order*").

[2] *See* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, 1998 FCC Lexis 1628, 63 Fed. Reg. 17111 (April 8, 1998) ("*Order on Reconsideration*").

[3] *See* PUBLIC NOTICE, Wireless Telecommunications Bureau Announces Broadband Personal Communications Service C Block Elections, DA 98-1168, released June 16, 1998, at 2.

[4] *See, e.g.*, Letter from Chief, Wireless Telecommunications Bureau, to Mr. Tyrone Brown, Senior Vice President, ClearComm L.P., DA 98-1525, released July 31, 1998 (waiver granted to permit licensee to change and resubmit its initial Election).

against the FCC for, *inter alia*, fraudulent conveyance of NPCI's C-block licenses.

The current status of the bankruptcy cases materially affects NPCI's ability to make a meaningful Election, and precludes such an Election from being made at this time. Applicable bankruptcy laws afford protections that extend the date for making an Election. Pending resolution of the reorganization proceedings, the Company has a fiduciary duty to preserve its rights and the value of its estate. Accordingly, NPCI hereby reserves the right to make an Election at the appropriate time in the future.

Respectfully submitted.

NEXTWAVE TELECOM, INC.

/s/ MICHAEL R. WACK
MICHAEL R. WACK
V.P. Regulation
NextWave Telecom Inc.
1101 Pennsylvania Ave., N.W.
Suite 805
Washington, D.C. 20004
(202-347-2771)(voice)
(202-347-2822)(facsimile)

cc:

Daniel Phythyon
Kathleen Ham
Jasmine Poltronieri
Sandra Danner
David Horowitz
Stewart Block

[SEAL OMITTED]

Federal Communications Commission
Washington, D.C. 20554

September 2, 1998

Michael R. Wack
V.P. Regulation
NextWave Telecom Inc.
1101 Pennsylvania Ave., N.W.
Suite 805
Washington, DC 20004

Dear Mr. Wack:

We have received your letter dated August 7, 1998, submitted on behalf of NextWave Telecom Inc. ("NextWave Telecom"). In the letter, you state that NextWave Personal Communications Inc., ("NPCI"), a subsidiary of NextWave Telecom, reserves the right to make an election regarding the 63 C Block PCS licenses that NPCI holds. By way of explanation, your letter invokes the ongoing bankruptcy proceedings in which the NextWave companies are embroiled, as well as protections in the form of an extended election deadline that applicable bankruptcy laws purportedly afford.

Please be informed that rights to make an election are set forth in the Commission's *Second Report and Order and Further Notice of Proposed Rule Making* in WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), *as modified by Order on Reconsideration of the Second Report and Order*, FCC 98-46 (released Mar. 24, 1998.) We are unaware of any provision in the federal Bankruptcy Code or other statute, which, at this time,

precludes application of the Commission's election requirements to NPCI.

Sincerely,

/s/ DANIE B. PHYTHYON
DANIEL B. PHYTHYON
Chief, Wireless
Telecommunications Bureau

cc: Christopher J. Wright
General Counsel

Kathleen O'Brien Ham
Deputy Chief, Wireless Telecommunications Bureau

Amy Zoslov
Chief, Auction & Industry Analysis Division
Wireless Telecommunications Bureau

Nos. 01-653 & 01-657

Supreme Court, U.S.
FILED
MAY 6 2002
CLERK

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORPORATION,
COUNCIL TREE COMMUNICATIONS, LLC, AND
VOICESTREAM WIRELESS CORPORATION,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS ARCTIC SLOPE REGIONAL CORPORATION, COUNCIL TREE COMMUNICATIONS, LLC, AND VOICESTREAM WIRELESS CORPORATION

MICHELE C. FARQUHAR
JONATHAN S. FRANKLIN*
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

* Counsel of Record — *Counsel for Petitioners*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether Section 525 of the Bankruptcy Code, 11 U.S.C. § 525, prohibits the Federal Communications Commission from canceling a radio spectrum license where the agency has determined, in an exercise of its regulatory authority, that such cancellation is necessary to ensure that licenses are granted to those most likely to use them efficiently for the benefit of the public.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners in these consolidated cases are the Federal Communications Commission ("FCC"), Arctic Slope Regional Corporation ("Arctic Slope"), Council Tree Communications, LLC ("Council Tree"), and VoiceStream Wireless Corporation ("VoiceStream"). The FCC and the United States were respondents in the proceedings below. Arctic Slope, Council Tree, and VoiceStream were intervenors in the proceedings below.

Arctic Slope is one of twelve regional corporations established by Congress under the terms of the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601 *et seq*. Arctic Slope has no parent corporations and no publicly held company owns 10 percent or more of its stock.

Council Tree has no parent corporations and no publicly held company owns 10 percent or more of its stock.

VoiceStream is a Delaware corporation that is wholly owned by Deutsche Telekom AG, a corporation organized under the laws of the Federal Republic of Germany.

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. were petitioners in the proceedings below. The following entities were also intervenors below and are respondents in this Court pursuant to S. Ct. R. 12.6: BellSouth Corporation; BellSouth Cellular Corporation; Cellco Partnership dba Verizon Wireless; AT&T Wireless Services, Inc.; Cellular Telecommunications Industry Association; Dobson Communications Corporation; Sprint Spectrum L.P. dba Sprint PCS; TeleCorp PCS, Inc.; and Nextel Communications, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
INTRODUCTION	4
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	18
I. THE CANCELLATION OF NEXTWAVE'S LICENSES DID NOT VIOLATE SECTION 525	21
A. NextWave's Licenses Were Cancelled Because of Valid Regulatory Reasons, Not "Solely" Because of Its Failure to Pay a Debt	21
B. NextWave's Licenses Were Not Cancelled Solely Because NextWave Failed to Pay a Debt That Is Dischargeable In Bankruptcy	28
II. THE DECISION BELOW IS INCONSISTENT WITH THE STRUCTURE AND LEGISLATIVE HISTORY OF THE BANKRUPTCY CODE	33

TABLE OF CONTENTS—Continued

	Page
III. THE DECISION BELOW IS INCONSISTENT WITH THE COMMUNICATIONS ACT AND DISSERVES THE PUBLIC INTEREST	39
CONCLUSION	45

TABLE OF AUTHORITIES

	Page
CASES:	
Almendarez-Torres v. *United States*, 523 U.S. 224 (1998)	38
Barnhart v. *Sigmon Coal Co.*, 122 S. Ct. 941 (2002)	25
Board of Governors v. *MCorp Financial, Inc.*, 502 U.S. 32 (1991)	33
Comeaux v. *Brown & Williamson Tobacco Co.*, 915 F.2d 1264 (9th Cir. 1990)	26
Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992)	25
Davis v. *Michigan Dep't of Treasury*, 489 U.S. 803 (1989)	33
Everex Systems, Inc. v. *Cadtrak Corp. (In re CFLC), Inc.*, 89 F.3d 673 (9th Cir. 1996)	31
Exquisito Services, Inc. v. *United States (In re Exquisito Services, Inc.)*, 823 F.2d 151 (5th Cir. 1987)	26, 27
FAA v. *Gull Air, Inc. (In re Gull Air, Inc.)*, 890 F.2d 1255 (1st Cir. 1989)	34
FCC v. *WOKO, Inc.*, 329 U.S. 223 (1946)	39
FTC v. *Mandel Bros.*, 359 U.S. 385 (1959)	33
Gustafson v. *Alloyd Co.*, 513 U.S. 561 (1995)	33
Housing Authority v. *Collins (In re Collins)*, 199 B.R. 561 (Bankr. W. D. Pa. 1996)	28
Housing Authority v. *James (In re James)*, 198 B.R. 885 (Bankr. W.D. Pa. 1996)	28, 39
In re Bacon, 212 B.R. 66 (Bankr. E.D. Pa. 1997)	38
Laracuente v. *Chase Manhattan Bank*, 891 F.2d 17 (1st Cir. 1989)	26, 27

TABLE OF AUTHORITIES—Continued

	Page
Medtronic, Inc. v. *Lohr*, 518 U.S. 470 (1996)	21
Metro Broadcasting, Inc. v. *FCC*, 497 U.S. 547 (1990), *overruled on other grounds, Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995)	6, 39
Morton v. *Mancari*, 417 U.S. 535 (1974)	39
North Haven Bd. of Education v. *Bell*, 456 U.S. 512 (1982)	21
Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982)	29
Perez v. *Campbell*, 402 U.S. 637 (1971)	9, 20, 36, 37
Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989)	25
Railway Labor Executives' Ass'n v. *Gibbons*, 455 U.S. 457 (1982)	29
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969)	6, 39
Robinson v. *Chicago Housing Authority (In re Robinson)*, 169 B.R. 171 (N.D. Ill. 1994), *aff'd*, 54 F.3d 316 (7th Cir. 1995)	38
Safety-Kleen, Inc. v. *Wyche*, 274 F.3d 846 (4th Cir. 2001)	27
Scripps-Howard Radio, Inc. v. *FCC*, 316 U.S. 4 (1942)	39, 41
Smith v. *St. Louis Housing Authority (In re Smith)*, 259 B.R. 901 (BAP 8th Cir. 2001)	38
Spruce Ltd. Partnership v. *Lutz (In re Lutz)*, 82 B.R. 699 (Bankr. M.D. Pa. 1988)	38, 39
TRW, Inc. v. *Andrews*, 122 S. Ct. 441 (2001)	25
Turner Broadcasting System, Inc. v. *FCC*, 512 U.S. 622 (1994)	5

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Dyer*, 216 F.3d 568 (7th Cir. 2000)	25
United States v. *GWI PCS 1, Inc.*, 245 B.R. 59 (N.D. Tex. 1999), *aff'd*, 230 F.3d 788 (5th Cir. 2000), *cert. denied*, 533 U.S. 964 (2001)	43
United States v. *Kansas Personal Communications Servs., Ltd.*, 256 B.R. 807 (D. Kan. 2000)	34
United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968)	6
United States v. *TechDyn Systems Corp. (In re TechDyn Systems Corp.)*, 235 B.R. 857 (Bankr. E.D. Va. 1999)	31
Universal Life Church, Inc. v. *United States (In re Universal Life Church, Inc.)*, 128 F.3d 1294 (9th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998)	27
Williams v. *Taylor*, 529 U.S. 420 (2000)	22
Wright v. *Union Central Life Ins. Co.*, 304 U.S. 502 (1938)	29

STATUTES:

11 U.S.C. § 362	14
11 U.S.C. § 362(a)	20, 33
11 U.S.C. § 362(a)(3)	33
11 U.S.C. § 362(a)(4)	34
11 U.S.C. § 362(a)(5)	34
11 U.S.C. § 362(b)(4)	20, 27, 33, 35
11 U.S.C. § 365	30
11 U.S.C. § 365(c)(1)(a)	31
11 U.S.C. § 525	*passim*

TABLE OF AUTHORITIES—Continued

	Page
11 U.S.C. § 525(a)	*passim*
11 U.S.C. § 525(b)	26
11 U.S.C. § 544(b)	12
11 U.S.C. § 1107	30
11 U.S.C. § 1123	14
11 U.S.C. § 1124	14
28 U.S.C. § 1141(d)(1)	32
28 U.S.C. § 1254(1)	2, 30
28 U.S.C. § 1334(a)	32
28 U.S.C. § 2342(1)	30
30 U.S.C. § 188	44
30 U.S.C. § 201	44
30 U.S.C. § 226	44
41 U.S.C. § 15	31
43 U.S.C. § 1601 *et seq.*	ii
47 U.S.C. § 301	29
47 U.S.C. § 309(a)	6, 40
47 U.S.C. § 309(j)	3
47 U.S.C. § 309(j)(1)	6, 31, 40
47 U.S.C. § 309(j)(3)(A)	7, 22, 41
47 U.S.C. § 309(j)(3)(B)	7, 42
47 U.S.C. § 309(j)(3)(D)	7, 22, 41
47 U.S.C. § 309(j)(4)(A)	7, 11, 42
47 U.S.C. § 309(j)(5)	42
47 U.S.C. § 309(j)(6)(C)	24
47 U.S.C. § 309(j)(7)(B)	8, 28
47 U.S.C. § 310(d)	31

TABLE OF AUTHORITIES—Continued

	Page
47 U.S.C. § 402(a)	30
47 U.S.C. § 402(b)	2, 30
Bankruptcy Reform Act of 1978, Pub. L. No. 95-598	8
Pub. L. No. 103-66, § 6002, 107 Stat. 312 (1993)	6
Pub. L. No. 105-33, § 3002(a), 111 Stat. 251 (1997)	6
ADMINISTRATIVE PROCEEDINGS:	
Applications of Alaska Native Wireless, L.L.C. File Nos. 0000364320 and 0000363827, Auction No. 35 - C & F Block PCS, No. DA-504 (WTB Mar. 4, 2002)	43
In re Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report & Order & Further Notice of Proposed Rulemaking, 12 F.C.C.R. 16436 (1997)	11, 40, 43
In re Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of Second Report & Order, 13 F.C.C.R. 8345 (1998)	11
In re Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Order on Reconsideration of Second Report & Order, 14 F.C.C.R. 6571 (1999)	11
In re Amendment of the Commission's Rules Regarding Installment Payment Financing	

TABLE OF AUTHORITIES—Continued

	Page
for Personal Communications Services (PCS) Licensees, 13 F.C.C.R. 15743 (1998) ...	42
In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Fifth Report & Order, 9 F.C.C.R. 5532 (1994)	7, 8, 23, 24
In re Public Notice DA 00-49, Auction of C and F Block Broadband PCS Licenses, 15 F.C.C.R. 17500 (2000)	2, 15
Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, FCC 02-33, App. B (Feb. 6, 2002)	41
Public Notice, *Auction of C and F Block Broadband PCS Licenses*, 15 F.C.C.R. 693 (2000)	1, 14
Public Notice, *D, E, and F Block Auction Closes*, No. DA 97-81, 1997 WL 20711 (Jan. 15, 1997)	10
Public Notice, *Wireless Telecommunications Bureau Announces the Return to Active Status of Licenses to NextWave Personal Communications Inc. and NextWave Power Partners Inc., Subject to the Outcome of Ongoing Litigation*, 16 F.C.C.R. 15970 (2001)	18
Public Notice, *Wireless Telecommunications Bureau Grants 15 C and F Block Broadband Personal Communications Services (PCS) Licenses to Alaska Native Wireless, L.L.C.*, No. DA 02-589 (WTB Mar. 11, 2002)	43

REGULATIONS:

25 C.F.R. § 211.20	44
25 C.F.R. § 211.54	44
25 C.F.R. § 212.20	44

TABLE OF AUTHORITIES—Continued

	Page
25 C.F.R. § 212.54	44
36 C.F.R. § 223.100	44
36 C.F.R. § 223.116	44
43 C.F.R. § 3508.11	44
47 C.F.R. § 1.2110(e)(4) (1997)	8, 23, 29
47 C.F.R. § 1.2110(e)(4)(iii) (1997)	8, 23
47 C.F.R. § 1.80	31
47 C.F.R. § 24.708(a) (1997)	8, 23, 29

RULE:

S. Ct. R. 12.6	ii

LEGISLATIVE MATERIALS:

H.R. Rep. No. 95-595 (1977)	*passim*
H.R. Rep. No. 103-111 (1993)	*passim*
S. Rep. No. 95-989 (1978)	11, 35, 36, 37

OTHER AUTHORITIES:

Bennett Z. Kobb, *Wireless SPECTRUM Finder* (2001)	42
Webster's II New College Dictionary (1995)	22, 26

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,

Respondents.

ARCTIC SLOPE REGIONAL CORPORATION,
COUNCIL TREE COMMUNICATIONS, LLC, AND
VOICESTREAM WIRELESS CORPORATION,

Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR PETITIONERS ARCTIC SLOPE REGIONAL CORPORATION, COUNCIL TREE COMMUNICATIONS, LLC, AND VOICESTREAM WIRELESS CORPORATION

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 254 F.3d 130 and reproduced at page 1a of the appendix to the petition for certiorari ("Pet. App.") filed by the FCC. The decision of the FCC is reported at 15 F.C.C.R. 693 (2000) and reproduced at

Pet. App. 96a. The FCC's order denying reconsideration of that decision is reported at 15 F.C.C.R. 17500 (2000) and reproduced at Pet. App. 52a.

JURISDICTION

The judgment of the D.C. Circuit was entered on June 22, 2001. Pet. App. 1a. On September 13, 2001, Chief Justice Rehnquist extended the time for petitioners FCC, Arctic Slope, and Council Tree to file a petition for certiorari to and including October 19, 2001. On September 17, 2001, Chief Justice Rehnquist extended the time for petitioner VoiceStream to file a petition for certiorari to and including October 19, 2001. The jurisdiction of the D.C. Circuit was based on 47 U.S.C. § 402(b). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 309(j) of the Federal Communications Act provides in pertinent part:

> (j) Use of competitive bidding
>
> (1) General authority
>
> If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.
>
> * * *
>
> (3) Design of systems of competitive bidding
>
> For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. * * * In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote * * * the following objectives:
>
> (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public * * *;
>
> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses * * *;
>
> (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;
>
> (D) efficient and intensive use of the electromagnetic spectrum * * *. [47 U.S.C. § 309(j).]

Section 525(a) of the Bankruptcy Act provides in pertinent part:

> [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor

> under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act. [11 U.S.C. § 525(a).]

Section 309(j) of the Communications Act and Section 525 of the Bankruptcy Code are reproduced in full at Pet. App. 448a-469a and 427a-428a, respectively. Pertinent provisions of Title 47 of the Code of Federal Regulations are reproduced at Pet. App. 470a-497a.

INTRODUCTION

This case asks whether the FCC is prohibited from carrying out its important statutory mandate under the Communications Act to allocate licenses to the Nation's radio spectrum to those applicants that the FCC has determined are most likely to use the licenses efficiently for the benefit of the public. Congress designated the FCC as the *exclusive* arbiter of the public interest in allocating the Nation's vital and valuable spectrum resources. And as expressly contemplated by Congress, the FCC determined that the public interest in ensuring efficient use of the spectrum and rapid deployment of vital new communications technologies is served by awarding licenses to those entities who value them most, as evidenced in part by timely payment of competitive bids.

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. (collectively, "NextWave") are spectrum licensees that defaulted on their payment obligations, thereby showing that they were not fit to hold the licenses under the FCC's regulatory policy. The D.C. Circuit, however, held that Section 525(a) of the Bankruptcy

Code allowed NextWave to frustrate the FCC's central regulatory mission by the simple expedient of declaring bankruptcy. The court permitted NextWave to retain licenses worth more than *$15 billion*, which the FCC determined were not in the public interest for NextWave to hold. In so ruling, the D.C. Circuit overturned the results of a spectrum auction that awarded those licenses to other companies that would serve the public while complying with all regulatory conditions. This ruling has permitted scarce and valuable spectrum to continue to lie fallow as it has for more than five years.

The D.C. Circuit's decision that the Bankruptcy Code overrides the important regulatory objectives of the Communications Act is based on an erroneous construction of the governing law. Section 525 was intended as a narrow proscription on discriminating against debtors; it was not intended to afford debtors special rights to evade valid regulatory requirements and frustrate important regulatory policies. Congress never intended for that bankruptcy provision to force agencies to grant exclusive licenses to entities that, like NextWave, fail to satisfy an express regulatory condition for holding a license. If left to stand, the D.C. Circuit's decision threatens to impair the ability of the FCC, as well as numerous other federal, state, and local government agencies, to carry out critical regulatory missions—to the public's detriment. That decision should be reversed.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background.

The Communications Act. The electromagnetic (or radio) spectrum is a valuable and scarce public resource. "[T]here are more would-be broadcasters than frequencies available in the electromagnetic spectrum," and "if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994).

Thus, Congress long ago determined that "regulation of the radio spectrum by the Federal Government was essential," and that "regulatory power should be utilized to ensure that allocation of this limited resource would be made *only* to those who would serve the public interest." *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 375 n.4 (1969) (emphasis added).

In the Communications Act of 1934, Congress "formulated a unified and comprehensive regulatory system for the [communications] industry." *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (quotation omitted). Congress centralized authority for allocating and regulating the spectrum in a single agency—the FCC. The Act established the FCC as the "single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication," *id.* (quotations omitted), and vests the agency with the sole authority to license users of the Nation's airwaves upon a determination that the "public interest, convenience, and necessity will be served [there]by." 47 U.S.C. § 309(a). As this Court has held, "Congress assigned to the Federal Communications Commission * * * *exclusive* authority to grant licenses" to use the radio spectrum. *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 553 (1990) (emphasis added), *overruled on other grounds*, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995).

Historically, the FCC allocated licenses through comparative hearings and lotteries. Congress eventually concluded, however, that those methods of allocation were "not serv[ing] the public interest." H.R. Rep. No. 103-111, at 248 (1993). Accordingly, in 1993, Congress authorized the FCC to award radio licenses "through [a] system of competitive bidding." Pub. L. No. 103-66, § 6002, 107 Stat. 312, 388. And in 1997, Congress *required* competitive bidding in most instances. *See* Pub. L. No. 105-33, § 3002(a), 111 Stat. 251, 258 (1997); 47 U.S.C. § 309(j)(1). Congress acted on the belief that "[b]ecause new licenses would be paid for, a competitive bidding system will ensure that spectrum is used

more productively and efficiently than if handed out for free." H.R. Rep. No. 103-111, at 249. Thus, Congress replaced the previous schemes for determining the public interest—which focused on individualized examinations of prospective licensees—with a scheme under which fitness is determined in large part by a licensee's willingness and ability to devote resources to serve the public in a timely manner.

In amending the Act to authorize competitive bidding, Congress directed the FCC to develop a methodology that would "include safeguards to protect the public interest in the use of the spectrum" and that would promote a number of objectives, including "the development and rapid deployment of new technologies, products, and services," and the "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3)(A), (D). Congress further directed the FCC to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people" by "disseminating licenses among a wide variety of applicants, including small businesses." *Id.* § 309(j)(3)(B). To accomplish this goal, Congress instructed the FCC to "consider alternative payment schedules and methods of calculation, including * * * guaranteed installment payments." *Id.* § 309(j)(4)(A).

In 1994, the FCC adopted rules to auction licenses for broadband personal communications services ("PCS")—a new generation of mobile communications services, featuring new devices such as small, lightweight, multi-function portable telephones. *In re Implementation of Section 309(j) of the Communications Act, Fifth Report & Order* ("*Section 309(j) Implementation Order*"), 9 F.C.C.R. 5532 ¶ 3 (1994). The FCC explained that auctions were superior to other licensing methods. It found that competitive bidding would better "speed the development and deployment of new services to the public and would encourage efficient use of the spectrum," because "*auctions would generally award licenses quickly to those parties who value them most highly*

and who are therefore most likely to introduce service rapidly to the public." *Id.* ¶ 5 (emphasis added). Thus, as Congress envisioned, the FCC made a policy judgment that market forces—as represented by an applicant's willingness and ability to pay for a license—would largely determine which applicants would best serve the public interest.

Seeking to fulfill its statutory mandate to promote small business participation, the FCC set aside two blocks of PCS licenses—the "C" and "F" Blocks—for bidding by entities with annual gross revenues and total assets below specified amounts. *Id.* ¶ 12. The FCC also decided to allow successful bidders within those blocks to pay for their licenses in installments. *Id.* ¶ 16.

To ensure that licenses remained in the hands of those who would further the important regulatory objectives set out in the Communications Act, the FCC made "full and timely payment of the winning bid" a regulatory condition for obtaining a license. 47 C.F.R. § 24.708(a) (1997). Likewise, for bidders paying for licenses under installment plans, the FCC specifically made "full and timely performance of the licensee's payment obligations under the installment plan" a regulatory condition for keeping a license. 47 C.F.R. § 1.2110(e)(4) (1997). The FCC's rules warned that, if a licensee failed to make a timely payment, "the license [would] automatically cancel." *Id.* § 1.2110(e)(4)(iii). This requirement was in accord with the FCC's policy determination that the public interest in the rapid introduction of new technologies and service is best served when spectrum is allocated to licensees who place the highest value on the licenses as evidenced by their ability to pay in a timely manner.

The Bankruptcy Code. In 1978, Congress enacted a comprehensive overhaul of the Nation's bankruptcy system. The central purpose of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598—which established today's Bankruptcy Code—was the "modernization" of the bankruptcy laws.

H.R. Rep No. 95-595, at 3 (1977). Designed during the "horse and buggy era," the substantive law of bankruptcy and the then-current bankruptcy system had last been revised in 1938. *Id.* Since then, the consumer credit industry had grown exponentially. One of the goals of the Reform Act was to "make[] bankruptcy a more effective remedy for the unfortunate consumer debtor." *Id.* at 4.

To that end, the Reform Act established a number of consumer debtor protections. Among them is Section 525, which is entitled "Protection against discriminatory treatment" and provides in pertinent part:

> [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license permit, charter, franchise, or other similar grant to * * * a person that is or has been a debtor under this title * * * solely because such * * * debtor is or has been a debtor under this title[,] * * * has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title * * *. [11 U.S.C. § 525(a).]

The legislative history makes clear that Section 525(a) was intended to "codif[y]" the result of this Court's decision in *Perez* v. *Campbell*, 402 U.S. 637 (1971). H.R. Rep. No. 95-595, at 165. *Perez* involved an Arizona statute that provided that the failure to satisfy a tort judgment arising out of an automobile accident resulted in the automatic suspension of a drivers' license even where the judgment had been discharged in bankruptcy. This Court invalidated the statute as conflicting with the former Bankruptcy Act's policy of ensuring debtors a "new start." 402 U.S. at 649.

As the House Report notes, "[s]imilar discrimination" to that at issue in *Perez* had also occurred in other areas. H.R. Rep. No. 95-595, at 165. "Municipalities have occasionally dismissed employees such as firemen or policemen because

of a bankruptcy," and "[n]onpayment of a debt to a credit union has occasionally resulted in loss of a job." *Id.* Moreover, "[d]iscrimination based solely on nonpayment could encourage reaffirmations [of debt], contrary to the [Code's] expressed policy." *Id.* at 367. The report thus emphasizes that Section 525(a) was intended to protect debtors from *discrimination*: "The purpose of the section is to prevent an automatic reaction against an individual for availing himself of the protection of the bankruptcy laws. * * * To penalize a debtor by discriminatory treatment as a result [of a bankruptcy] is unfair * * *." *Id.* at 165.

Accordingly, the report makes clear that:

> [t]he prohibition does not extend so far as to prohibit examination of the factors surrounding the bankruptcy, the imposition of financial responsibility rules if they are not imposed only on former bankrupts, or the examination of prospective financial condition or managerial ability. * * * *[I]n those cases where the causes of a bankruptcy are intimately connected with the license,* * * * *an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy.* [H.R. Rep. No. 95-595, at 165 (emphasis added).]

B. Factual Background.

NextWave's Bankruptcy. NextWave was formed in 1995 for the purpose of bidding on PCS licenses. At the FCC's C Block auctions in 1996, NextWave successfully bid on 63 licenses, bidding $4.74 billion in total. Pet. App. 5a. NextWave also successfully bid on 27 F Block licenses after submitting bids totaling approximately $123 million. Public Notice, *D, E, and F Block Auction Closes*, No. DA 97-81, 1997 WL 20711 (Jan. 15, 1997).

Under FCC rules, and as contemplated by Congress, *see* 47 U.S.C. § 309(j)(4)(A), NextWave was permitted to pay for its licenses in installments. NextWave made a down payment, and the FCC granted NextWave its licenses. The licenses, however, expressly stated that they were "conditioned upon the full and timely payment of all monies due," and that failure to comply with that obligation "[would] result in the automatic cancellation" of the licenses. Pet. App. 388a.

After the FCC awarded the C Block licenses, NextWave and other C Block bidders encountered financial difficulties. In response, the FCC temporarily suspended installment payment obligations for C Block licensees, and issued a series of orders offering financially troubled licensees several payment restructuring options that allowed them to surrender some or all of their licenses for full or partial forgiveness of their outstanding debt.[1] The FCC refused, however, to allow any bidders to retain their licenses for less than they had bid, reasoning that such a result "would be very unfair to other bidders," and would "gravely undermine the credibility and integrity" of the auction process. 12 F.C.C.R. 16436 ¶ 19. The FCC gave licensees until June 8, 1998 to elect an option, and until October 29, 1998 to resume installment payments.

Although many C Block licensees chose to avail themselves of a restructuring option and surrender licenses for

---

[1] *See In re Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report & Order & Further Notice of Proposed Rulemaking*, 12 F.C.C.R. 16436 (1997); *In re Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of Second Report & Order*, 13 F.C.C.R. 8345 (1998); *In re Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Order on Reconsideration of Second Report & Order*, 14 F.C.C.R. 6571 (1999).

which they could not pay, NextWave did not. Instead, on June 8, 1998, after failing to obtain stays of the election deadline from the FCC and the D.C. Circuit, NextWave filed a Chapter 11 petition for bankruptcy in New York. After declaring bankruptcy, NextWave made no installment payments on its licenses, nor did it ever seek permission to do so. Rather, NextWave sought to avoid its $4.74 billion license obligation as a "fraudulent conveyance" while at the same time retain its licenses. NextWave alleged that by the time it received its licenses they were worth far less than what it had bid for them.[2]

Ruling in NextWave's favor, the Bankruptcy Court found that NextWave's winning bid exceeded the fair market value of the licenses at the time they were granted, and that a fraudulent conveyance had thus occurred. Pet. App. 357a-358a (*NextWave Personal Communications, Inc.* v. *FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 277 (Bankr. S.D.N.Y. 1999)). Consequently, the court avoided $3.72 billion of NextWave's $4.74 billion obligation to the FCC, ruling in effect that NextWave could keep its licenses for the reduced price of $1.02 billion. *Id.* The District Court upheld the Bankruptcy Court's decision.

The Second Circuit reversed. *Id.* at 213a (*FCC* v. *NextWave Personal Communications, Inc. (In re NextWave Personal Communications, Inc.)*, 200 F.3d 43 (2d Cir. 1999), *cert. denied*, 531 U.S. 43 (2000)). The court observed that the Bankruptcy Court had treated the matter as "a simple bankruptcy case," and the issues before it as concerning "solely the debtor-creditor relationship between the FCC and [NextWave]." *Id.* at 234a (quotations omitted). That approach, the Second Circuit held, was "fundamentally mis-

[2] Section 554(b) of the Code allows the avoidance of "any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law." 11 U.S.C. § 544(b).

taken." *Id.* at 235a. As the court explained, the FCC's "full and timely payment" requirement was "a *regulatory* condition for obtaining and retaining a spectrum license," and had "a *regulatory* purpose related directly to the FCC's implementation of the spectrum auctions"—"to ensure that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives." *Id.* at 229a-230a, 235a (emphasis added).

The FCC "had used the willingness and ability of NextWave to pay more than its competitors as the basis on which it decided to grant the [l]icenses to NextWave." *Id.* at 234a. Thus, "NextWave's inability to follow through on its financial undertakings had more than financial implications":

> [i]t indicated that under the predictive mechanism created by Congress to guide the FCC, *NextWave was not the applicant most likely to use the Licenses efficiently for the benefit of the public in whose interest they were granted.* It meant, in *regulatory* terms, that NextWave was not entitled to the Licenses." [*Id.* (emphasis added).]

As the court held, "[b]y holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion," the Bankruptcy Court had impermissibly "impaired the FCC's method for selecting licensees by effectively awarding the Licenses to an entity that the FCC determined was not entitled to them." *Id.* at 235a.

Upon remand, NextWave prepared a new plan of reorganization that provided for a single lump sum payment to satisfy its $4.3 billion outstanding obligation to the FCC. The FCC objected to the plan on the basis that—as expressly provided in the agency's regulations and the licenses themselves—NextWave's C and F Block licenses had automatically canceled when NextWave defaulted on its first installment payment. On January 12, 2000, the FCC issued a Public Notice announcing that NextWave's licenses—as well as licenses previously held by others—would be re-auctioned in

light of the prior automatic cancellations. *Id.* at 96a (Public Notice, *Auction of C and F Block Broadband PCS Licenses*, 15 F.C.C.R. 693 (2000)).

NextWave again sought relief from the Bankruptcy Court, which declared the FCC's cancellation of NextWave's licenses "null and void." *Id.* at 135a (*In re NextWave Personal Communications Inc.*, 244 B.R. 253 (Bankr. S.D.N.Y. 2000)). Among other things, the court concluded that the cancellation violated the Bankruptcy Code's automatic stay (11 U.S.C. § 362) and cure (11 U.S.C. §§ 1123, 1124) provisions. *Id.* at 155a-163a. The court also indicated that the cancellation may have violated Section 525. *Id.* at 163a-168a. The court acknowledged that the Second Circuit had held "that there is a 'regulatory' aspect in the FCC's 'payment in full' requirement," *id.* at 191a, but concluded that there is "no such aspect * * * with respect to the FCC's 'timely payment' requirement," which it considered a matter of "pure debtor-creditor economics." *Id.*

The Second Circuit granted mandamus, holding that the Bankruptcy Court had once again impermissibly "interfer[ed] with the licensing decisions of the FCC." *Id.* at 128a (*In re FCC*, 217 F.3d 125 (2d Cir.), *cert. denied*, 531 U.S. 1029 (2000)). The Bankruptcy Court, the Second Circuit observed, had concluded that the FCC's cancellation of the licenses "lack[ed] any comprehensible regulatory objective," and was "therefore simply the action of an ordinary creditor." *Id.* at 118a (quotation omitted). As the Second Circuit explained, however, "the regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time." *Id.* at 119a. Thus, because "[t]here can be little doubt that if full payment is a regulatory condition, so too is timeliness," the FCC's decision to re-auction NextWave's licenses "implicate[d] the conditions of

licensure, in itself a circumstance sufficient to require the bankruptcy court's deference." *Id.*

In the meantime, NextWave filed a petition asking the FCC to reconsider the cancellation of its licenses, arguing, among other things, that the cancellation violated various provisions of the Bankruptcy Code. The FCC denied the petition, finding that the cancellation was "fully consistent" with Section 309 and its implementing regulations. *Id.* at 66a (*In re Public Notice DA 00-49, Auction of C and F Block Broadband PCS Licenses*, 15 F.C.C.R. 17500 ¶ 11 (2000)). As the Commission explained:

> NextWave is providing no service. The spectrum licensed to NextWave has gone unused since early 1997 and represents licenses in 90 markets across the United States. * * * *NextWave's failure to utilize the spectrum and its attempts to shield the spectrum in bankruptcy have hindered the growth of innovative and competitive telecommunications services in many areas of the United States, to the detriment of the American public.* [*Id.* at 82a (emphasis added).]

The Re-Auction. NextWave appealed the FCC's decision to the D.C. Circuit. While its appeal was pending, the FCC held a new auction of NextWave's licenses (as well as licenses previously held by others), in order to award them to entities that, unlike NextWave, would satisfy the FCC's regulatory requirements. The auction was completed on January 26, 2001. Petitioner Arctic Slope has a substantial interest in Alaska Native Wireless, LLC ("ANW"), which in the re-auction successfully bid over $2.7 billion for licenses previously held by NextWave, subject to certain regulatory approvals.[3] Petitioner VoiceStream successfully bid over

[3] ANW is not a formal party to this case because ANW had not yet been formed when intervention motions were required to be filed in the D.C. Circuit. Counsel for petitioners is also counsel for ANW, and this brief represents the views of ANW as well.

$364 million for licenses previously held by NextWave. In addition, VoiceStream has a substantial, non-controlling interest in Cook Inlet/VS GSM V PCS, LLC, which successfully bid over $474 million for licenses previously held by NextWave. Petitioner Council Tree participated in the proceedings leading up to the re-auction, and is a prospective participant in future FCC auctions. Overall, successful bids for NextWave's licenses totaled more than $15.8 billion, more than three times what NextWave had bid for them in 1996. On November 13, 2000, the D.C. Circuit granted petitioners leave to intervene in the proceedings below.

The Decision Below. On June 22, 2001, the D.C. Circuit invalidated the FCC's cancellation of NextWave's licenses. *Id.* at 2a. As a threshold matter, the court determined that it was not bound by the Second Circuit's mandamus decision under principles of res judicata. According to the D.C. Circuit, the Second Circuit's decision was exclusively jurisdictional in nature—"a decision about *where* NextWave's bankruptcy challenges should be decided, not *how* they should be resolved." *Id.* at 22a-23a (quotation omitted; emphasis in original). Thus, in the D.C. Circuit's view, the Second Circuit had rejected NextWave's Bankruptcy Code arguments on the bizarre ground that the Bankruptcy Court lacked jurisdiction to apply the Bankruptcy Code. *Id.* at 24a (construing Second Circuit as holding that "the bankruptcy court lacked jurisdiction to apply the Code to [the FCC's] acts"). The D.C. Circuit thus held that it could consider anew NextWave's argument that the cancellation of its licenses contravened Section 525 of the Bankruptcy Code—an argument that NextWave had raised in the Second Circuit but upon which it had not prevailed.

Turning to the merits, the court held that the cancellation of NextWave's licenses violated Section 525 because—in its view—the FCC had cancelled NextWave's licenses "solely because" NextWave had not paid a debt dischargeable in its bankruptcy case. In doing so, the court rejected the argument

that the licenses had not been cancelled "solely" because NextWave had failed to pay a dischargeable debt, but rather because the FCC had determined that NextWave was not "the applicant most likely to use the [l]icenses efficiently for the benefit of the public." *Id.* at 45a (quotation omitted). The court acknowledged that "[i]t may be true, as the Second Circuit decided, that the Commission had a regulatory motive for examining NextWave's timely payment record and canceling its licenses on that basis." *Id.* Nevertheless, the court held that because NextWave's failure to make its payments was "the 'sole' trigger of the license cancellation," *id.*, Section 525 applied even though the Commission had "acted for a regulatory purpose." *Id.* at 51a.

The court also rejected the argument that so long as NextWave retained its licenses its payment obligations were express regulatory conditions and were thus not "dischargeable" within the meaning of Section 525. *Id.* at 42a. In the D.C. Circuit's view, although the Second Circuit had held that the Bankruptcy Court "had no authority to modify" the license condition, "[i]t never decided that a court of competent jurisdiction (such as this one) could not modify or discharge it under section 525." *Id.* The court also held that the FCC was improperly requesting "a regulatory purpose exception to section 525." *Id.* at 42a-43a.

The D.C. Circuit "ha[d] no doubt that in developing its installment payment plan, the Commission made a good faith effort to implement Congress's command to encourage small businesses with limited access to capital to participate in PCS auctions." *Id.* at 48a. The court was also "mindful that * * * allowing NextWave to retain its licenses may be grossly unfair to losing bidders and licensees who complied with the administrative process and forfeited licenses or made timely payments despite their financial difficulties." *Id.* (quotation omitted). But "[a]ny unfairness," the court reasoned, "was inherent in the Commission's decision to employ a licensing scheme that left its regulatory actions open to attack under

* * * the Bankruptcy Code." *Id.* at 48a-49a. As the court saw it, "nothing in the [Communications] Act required [the FCC] to enter a creditor relationship with winning bidders." *Id.* at 50a. "Having chosen * * * a scheme that put it in a creditor-debtor * * * relationship with its licensees," *id.*, the court concluded, "section 525 prevents the Commission, *whatever its motive*, from canceling the licenses of winning bidders who fail to make timely installment payments while in Chapter 11." *Id.* at 49a (emphasis added).

The D.C. Circuit subsequently denied the FCC's request to stay the mandate pending the filing of a petition for certiorari. The FCC thereupon reinstated NextWave's licenses, subject to the caveat that ongoing litigation "may affect the status of the involved licenses." Public Notice, *Wireless Telecommunications Bureau Announces the Return to Active Status of Licenses to NextWave Personal Communications Inc. and NextWave Power Partners Inc., Subject to the Outcome of Ongoing Litigation*, 16 F.C.C.R. 15970 (2001).

Winning bidders in the re-auction have sought to employ the former NextWave licenses to serve the public while complying with all license conditions. The D.C. Circuit's decision, however, has frustrated that effort. Meanwhile, NextWave has yet to serve a single customer with the spectrum that is the subject of this case, which it was awarded more than five years ago.

SUMMARY OF ARGUMENT

Section 525 is a narrow anti-discrimination provision that prevents government agencies from denying, revoking, suspending, or refusing to renew licenses or similar grants "solely because" a person is or was a debtor or has not paid a debt "dischargeable" in bankruptcy. Congress's goal was to further the Bankruptcy Code's policy of giving debtors a "fresh start," by precluding agencies from taking certain actions against debtors *solely* because of their bankruptcy. NextWave seeks to use this modest shield as a sword to

ensure its stranglehold on the public airwaves notwithstanding its failure to comply with a key regulatory condition of its licenses. In sanctioning that result, the D.C. Circuit erred in its interpretation of the law.

NextWave's licenses were not cancelled "solely because" NextWave failed to pay a debt. Section 525 prevents a government agency from canceling a license for one of the reasons enumerated in the statute, *and no other*. Here, it is undisputed that the FCC had a valid regulatory motive for automatically canceling NextWave's licenses—its express, unchallenged determination that NextWave's further control of those licenses disserves the public interest. The FCC's auction rules—including its "full and timely payment" requirement—"have primarily a regulatory purpose: to ensure that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives." Pet. App. 235a. The D.C. Circuit thus erred in preventing the FCC from fulfilling its exclusive statutory responsibility to determine whether a licensee's use of the public airwaves serves the public interest. Because Section 525 does not prohibit a government agency from canceling a license even in part for *any* reason other than those enumerated in the statute, the FCC did not run afoul of Section 525 in canceling NextWave's licenses in furtherance of its regulatory policy.

Moreover, NextWave's licenses were not cancelled solely because NextWave failed to pay a "debt that is dischargeable" in bankruptcy. The Bankruptcy Court had no jurisdiction or authority to modify the FCC's timely-payment condition—the reason for the cancellation—while NextWave held its licenses, and the payment condition was thus not "dischargeable" within the meaning of Section 525. And in any event, to the extent NextWave's licenses can be viewed as contracts rather than regulatory obligations, the parties' duties are executory, and even NextWave admits that the cancellation of an executory contract for failure to adhere to its terms does not violate Section 525.

The D.C. Circuit's decision is also inconsistent with the structure and legislative history of the Bankruptcy Code. The D.C. Circuit's interpretation of Section 525 cannot be reconciled with Section 362(b)(4), which exempts regulatory action from the broad scope of the Code's "automatic stay." Congress plainly did not intend to exempt the FCC's regulatory actions from the stay, while at the same time absolutely prohibit them under Section 525. The legislative history of the Code confirms this understanding. Congress intended to prevent "discrimination" against debtors by codifying this Court's decision in *Perez* v. *Campbell*, 402 U.S. 637 (1971), which invalidated a state law that served as a weapon to coerce debtors into paying discharged debts owed to third parties. In this case, the FCC was not enforcing NextWave's payment obligations to coerce NextWave into paying a debt, but rather to enforce a regulatory condition designed to ensure that licenses go to those most likely to further the public interest in the rapid deployment of new technologies and the efficient use of the spectrum. Moreover, an even-handed policy of canceling licenses for failure to meet express regulatory conditions—including timely payment for the licenses themselves—in no way discriminates against debtors.

Finally, the decision below needlessly creates a conflict between the Bankruptcy Code and the Communications Act. Congress long ago vested in the FCC the *exclusive* authority to grant licenses to the Nation's spectrum. In authorizing the FCC to award licenses through competitive bidding, Congress not only continued the FCC's role as the exclusive arbiter of the public interest, but also established a strong national policy favoring auctions as a principal means of determining that public interest. The D.C. Circuit held that the Bankruptcy Code forces the FCC to leave licenses in the hands of an entity the agency has determined is not serving the public interest. That decision strips the FCC of its regulatory authority, undermines the integrity of the auction

process, and impedes the important regulatory goals identified by Congress in the Communications Act.

The implications of the D.C. Circuit's decision extend far beyond this case. Hundreds of federal, state, and local government agencies award licenses, franchises, and similar grants conditioned in part on payment obligations designed to ensure that the public interest is served. Under the D.C. Circuit's decision, however, those agencies cannot cancel a license or similar grant where a debtor defaults on a payment obligation, even if an agency reasonably determines in an exercise of its regulatory authority that the debtor's default demonstrates that its continued hold on a license disserves the public interest. Congress did not intend for Section 525 to frustrate important regulatory policies in this manner.

ARGUMENT

I. THE CANCELLATION OF NEXTWAVE'S LICENSES DID NOT VIOLATE SECTION 525.

A. NextWave's Licenses Were Cancelled Because of Valid Regulatory Reasons, Not "Solely" Because of Its Failure to Pay a Debt.

The starting point in determining the scope of Section 525 is the statute itself. *See, e.g., Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 484 (1996); *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 520 (1982). Section 525(a) provides that, with certain exceptions not at issue here:

> [A] government unit may not deny, revoke, suspend, or refuse to renew a license * * * to * * * a person that is or has been a debtor under this title * * * *solely because* such * * * debtor * * * is or has been a debtor under this title[,] has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title. [11 U.S.C. § 525(a) (emphasis added).]

The D.C. Circuit concluded that the FCC violated Section 525 because—in its view—the agency cancelled NextWave's licenses "solely because" NextWave failed to pay a debt dischargeable in its bankruptcy case. That was error.

This Court gives the words of a statute their "ordinary, contemporary, common meaning." *Williams* v. *Taylor*, 529 U.S. 420, 431 (2000) (quotation omitted). "Solely" means "alone," "singly," "exclusively." *See, e.g., Webster's II New College Dictionary* 1050 (1995). Thus, a government agency does not contravene Section 525 unless it cancels a debtor's license for one of the reasons prohibited by the statute, *and no other*. In this case, the FCC had an *unchallenged* reason for canceling NextWave's licenses that is not among those enumerated in the statute—its regulatory determination that allowing NextWave to retain its licenses would not serve the public interest as contemplated by Congress. Because it is undisputed that this critical regulatory purpose was a central reason for the automatic cancellation of NextWave's licenses, that cancellation did not occur "solely" because of NextWave's bankrupt status or failure to pay a dischargeable debt, and Section 525 accordingly was not violated.

Recognizing that "a competitive bidding system will ensure that spectrum is used more productively and efficiently than if handed out for free," H.R. Rep. No. 103-111, at 249, Congress directed the FCC to award radio licenses by auction in a manner that promotes important governmental objectives, including the "development and rapid deployment of new technologies, products, and services for the benefit of the public," and the "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3)(A), (D). In adopting rules for awarding the PCS licenses at issue in this case, the FCC specifically determined that "the use of competitive bidding to award broadband PCS licenses, as compared to other licensing methods, would speed the development and deployment of new services to the public and would encourage efficient use of the spectrum," because

"auctions would generally award licenses quickly to those parties who value them most highly and who are therefore most likely to introduce service rapidly to the public." *Section 309(j) Implementation Order*, 9 F.C.C.R. 5532 ¶ 5.

As the Second Circuit explained in rejecting NextWave's attempts to invoke the Bankruptcy Code as a basis for keeping its licenses, the auction mechanism can achieve "fair and efficient allocation of spectrum licenses * * * only if the high bid entails the obligation to make good the amount bid." Pet. App. 246a. Accordingly, the FCC made "full and timely payment of the winning bid" a condition for holding a license. *See* 47 C.F.R. § 24.708(a) (1997); 47 C.F.R. § 1.2110(e)(4) (1997). As the Second Circuit explained, the FCC's auction rules—including its "full and timely payment" requirement—"have primarily a regulatory purpose: to ensure that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives." Pet. App. 235a. The FCC "had used the willingness and ability of NextWave to pay more than its competitors as the basis on which it decided to grant the [l]icenses to NextWave." *Id.* at 234a. Thus, "NextWave's inability to follow through on its financial undertakings had more than financial implications." *Id.* "It indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave *was not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted*." *Id.* (emphasis added).

Accordingly, the FCC's cancellation of NextWave's licenses did not occur "solely because" NextWave failed to pay a "debt." Rather, the licenses cancelled because NextWave failed to satisfy an express *regulatory* condition on NextWave's right to hold its licenses. NextWave has not—and could not—challenge the validity of the regulatory policies underlying the FCC's timely-payment condition. Nor could it credibly dispute that allowing a licensee to retain its hold on the public airwaves notwithstanding a failure to

satisfy license payment conditions quite clearly frustrates the FCC's regulatory purposes. As the FCC found, "NextWave's failure to utilize the spectrum and its attempts to shield the spectrum in bankruptcy have hindered the growth of innovative and competitive telecommunications services in many areas of the United States, to the detriment of the American public." Pet. App. 82a.

In sum, NextWave's licenses were cancelled because NextWave's retention of them was not in the public interest as determined by the FCC. The cancellation was therefore not "solely" because NextWave failed to pay a debt, and any other interpretation of Section 525 would destroy the integrity of the Communications Act's licensing scheme. Having designated the FCC as the exclusive arbiter of the public interest in the allocation of the radio spectrum, it is inconceivable that Congress intended for licensees, aided by bankruptcy judges, to countermand the FCC's determination of the public interest simply by declaring bankruptcy. In fact, Congress determined the opposite. In authorizing competitive bidding, Congress declared that "[n]othing * * * in the use of competitive bidding, shall diminish the authority of the [FCC] * * * to regulate or *reclaim* spectrum licenses." 47 U.S.C. § 309(j)(6)(C) (emphasis added). Yet under the D.C. Circuit's interpretation, NextWave need never pay for its valuable licenses and the FCC will *never* be able to reclaim them where the cancellation is related even in part to that non-payment. That is not what Congress intended.

NextWave has never seriously disputed that the FCC had a valid regulatory motive for canceling its licenses. Nor did the D.C. Circuit. *See* Pet. App. 45a ("It may be true, as the Second Circuit decided, that the Commission had a regulatory motive for examining NextWave's timely payment record and canceling its licenses on that basis."). Nevertheless, the court held that *regardless* of whether the FCC "acted for a regulatory purpose," *id.* at 51a, the agency ran afoul of Section 525 because NextWave's failure to make its payments was "the 'sole' trigger of the license cancellation." *Id.* at 45a. In other words, the court concluded that because NextWave's licenses would not have cancelled "but for" NextWave's failure to make a timely installment payment, the FCC violated Section 525—even if the agency had other legitimate reasons for canceling the licenses.

That holding ignores the plain language of the statute. This Court has stated " 'time and again' " that Congress " 'says in a statute what it means and means in a statute what it says.' " *Barnhart* v. *Sigmon Coal Co.*, 122 S. Ct. 941, 956 (2002) (quoting *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992)). Thus, when Congress said "solely," it meant what it said. Section 525 does not prohibit a government agency from canceling a license even in part for *any* reason other than those enumerated in the statute, because in that case the cancellation does not occur "solely because" of one of the statute's prohibited reasons. So long as a government unit acts at least in part for a valid reason not enumerated in the statute, Section 525 is not violated merely because the cancellation would not have occurred "but for" one of the prohibited reasons. " 'But for' causation is * * * poles apart from 'sole cause,' as innumerable cases * * * make clear." *United States* v. *Dyer*, 216 F.3d 568, 570 (7th Cir. 2000) (Posner, J.) (citing cases). Indeed, in the civil rights context, this Court has clearly distinguished the concept of "but for" causation from "sole" causation, noting that the words " 'because of' do not mean '*solely* because of.' " *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241 (1989) (emphasis in original) (superseded by statute on other grounds). The D.C. Circuit's contrary reading of Section 525 impermissibly renders the word "solely" superfluous. *See TRW, Inc.* v. *Andrews*, 122 S. Ct. 441, 449 (2001) (statute must be con-

strued so that "no clause, sentence, or word [is] superfluous, void, or insignificant") (quotation omitted).[4]

In brushing aside the FCC's undisputed regulatory motive, the D.C. Circuit also concluded that "the statute says nothing about an agency's motives in canceling a license for failure to pay a dischargeable debt." Pet. App. 45a. The court further reasoned that an "intent-based reading of section 525 would allow governmental units to escape section 525's limitations simply by invoking a regulatory motive for their concern with timely payment." *Id.* But Section 525, like other anti-discrimination laws, *is* inherently "intent-based." It prohibits a government entity from canceling a license solely *because*—*i.e.*, solely "[f]or the reason that"[5]—a debtor "is or has been a debtor," "has been insolvent," or "has failed to pay a debt that is dischargeable" in its bankruptcy case.

Moreover, there is no basis for the D.C. Circuit's concern that agencies will be able to "escape" Section 525's prohibitions if the statute is interpreted to mean what it says. The mere fact that an agency will often have a valid regulatory reason for canceling a license is no justification for disregarding the statute's plain terms. *See, e.g.*, *Laracuente*, 891

---

[4] Not surprisingly, other circuit courts have soundly rejected a "but for" approach when interpreting the words "solely because" in Section 525. *See Comeaux* v. *Brown & Williamson Tobacco Co.*, 915 F.2d 1264, 1268-69 (9th Cir. 1990); *Laracuente* v. *Chase Manhattan Bank*, 891 F.2d 17, 21-23 (1st Cir. 1989); *Exquisito Servs., Inc.* v. *United States (In re Exquisito Servs., Inc.)*, 823 F.2d 151, 152-154 (5th Cir. 1987) (all applying identical relevant language of Section 525(a) and (b)). As the Fifth Circuit has held, the "better approach" is to read the statute "narrowly" in accord with its plain language and "require[] proof that [the challenged action] was caused *solely*" for one of the statute's proscribed reasons, and no other. *Exquisito*, 823 F.2d at 153 (emphasis added).

[5] *Webster's II New College Dictionary* 98. "Reason," in turn, means "basis or motive for an action [or] decision." *Id.* at 923.

F.2d at 22-23 & n.2 (unlikelihood that government agency could be found to have acted solely on enumerated grounds is not grounds for construing Section 525 other than as written). Simply issuing a regulation requiring timely payment does not necessarily make timely payment a valid regulatory condition for holding a license rather than a purely financial one. For example, the cancellation of a business or professional license for non-payment of an unrelated debt that was discharged in bankruptcy will not necessarily serve a legitimate regulatory purpose. Here, by contrast, it is *undisputed* that the FCC's "full and timely payment" requirement served valid "regulatory" purposes, including "the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum." Pet. App. 119a.

And even where, unlike here, the existence of a valid regulatory purpose is disputed, courts are quite capable of discerning between valid regulatory goals and the kinds of purely financial motives the Bankruptcy Code addresses. For instance, in applying the "regulatory power" exception to the Bankruptcy Code's "automatic stay" provisions, *see* 11 U.S.C. § 362(b)(4); *infra* at 33-34, courts routinely must "distinguish[] between situations in which the [government] acts pursuant to its 'police and regulatory power' and situations in which the [government] acts merely to protect its status as a creditor." *Safety-Kleen, Inc.* v. *Wyche*, 274 F.3d 846, 865 (4th Cir. 2001). Laws often have the "dual purpose" of "promoting the public welfare as well as protecting the [government's] pecuniary interest." *Id.* In these circumstances, "[o]nly if the action is pursued *solely* to advance a pecuniary interest of the governmental unit will the automatic stay bar it." *Universal Life Church, Inc.* v. *United States (In re Universal Life Church, Inc.)*, 128 F.3d 1294, 1299 (9th Cir. 1997) (emphasis added; quotation omitted), *cert. denied*, 524 U.S. 952 (1998). *See also Safety-Kleen*, 274 F.3d at 865 (citing cases applying "primary purpose" test). Likewise, courts are plainly capable of applying the plain language of

Section 525 to determine whether an action with respect to a license or similar grant has been taken "solely because" of one of the listed reasons or whether, as here, the action is based at least in part on a valid regulatory purpose.[6]

In authorizing the FCC to use competitive bidding, Congress directed the FCC not to use revenue-collection concerns as the *sole* reason for license determinations. *See* 47 U.S.C. § 309(j)(7)(B) (FCC may not "bas[e] a finding of public interest, convenience, and necessity *solely* or predominantly on the expectation of Federal revenues") (emphasis added). *See also* H.R. Rep. No. 103-111, at 258 (the FCC "is not a collection agency of the U.S. Government"). NextWave has never alleged—nor could it—that the FCC failed to comply with the Communications Act when it determined that its "full and timely payment" requirement serves important regulatory purposes rather than just financial interests. Implementation of that requirement is likewise entirely consistent with Section 525.

B. NextWave's Licenses Were Not Cancelled Solely Because NextWave Failed to Pay a Debt That Is Dischargeable In Its Bankruptcy Case.

The D.C. Circuit's decision cannot be squared with the terms of Section 525 for another, related reason. Section 525 prohibits a government agency from canceling a license "solely because" a debtor "has not paid a debt that *is dischargeable in the case under this title*." 11 U.S.C. § 525(a) (emphasis added). As noted, NextWave's timely-payment

---

6 *See, e.g., Housing Auth.* v. *James (In re James)*, 198 B.R. 885, 888 (Bankr. W.D. Pa. 1996) ("Section 525(a) is not violated, even if one of the grounds enumerated therein is present, so long as the governmental unit also has a *bona fide* reason other than those enumerated therein for taking action against [the] debtor."); *accord Housing Auth.* v. *Collins (In re Collins)*, 199 B.R. 561, 566 (Bankr. W.D. Pa. 1996).

obligations—the reason for the automatic cancellation—were express regulatory conditions on its right to hold its licenses. *See* Pet. App. 388a; 47 C.F.R. § 1.2110(e)(4) (1997). As such, the licenses were not cancelled for failure to pay "a debt that is dischargeable" in NextWave's bankruptcy case, because the Bankruptcy Court had no power to modify the FCC's regulatory conditions required while NextWave held its licenses. The D.C. Circuit's contrary conclusion is an additional ground for reversal.

"[T]he restructuring of debtor-creditor relations * * * is at the core of the federal bankruptcy power." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982). *See also Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457, 466 (1982) ("bankruptcy" is defined as " the 'subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief' ") (quoting *Wright* v. *Union Central Life Ins. Co.*, 304 U.S. 502, 513-514 (1938)). As the Second Circuit explained in rebuffing the Bankruptcy Court's attempts to modify NextWave's payment obligations, "[i]n granting licenses by auction, the FCC acts as creditor and regulator both." Pet. App. 244a. The Bankruptcy Code—with its purpose of "restructuring * * * debtor-creditor relations"—applies to the FCC's actions, however, only insofar as the FCC "act[s] solely as a creditor." *Id.* at 245a. It does not purport to limit the FCC's exercise of its regulatory authority. *Id.* at 244a.

As noted above, the FCC's timely-payment requirement serves indisputably valid regulatory goals. Congress has further provided that "no [spectrum] license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301. The Bankruptcy Court thus had no authority to relieve NextWave of its *regulatory* payment condition so long as NextWave retained its licenses, for to do so would impermissibly tread on the FCC's regulatory authority and grant NextWave a right

beyond the terms and conditions of the license. Indeed, the Bankruptcy Court had no jurisdiction even to consider doing so, as Congress has vested exclusive jurisdiction to review FCC regulatory decisions in the D.C. Circuit and the other Courts of Appeal. *See* 47 U.S.C. § 402(a), (b); 28 U.S.C. § 2342(1). Thus, while NextWave held its licenses, its regulatory payment obligation was not subject to modification in bankruptcy, and was not a "debt that is dischargeable in the case under this title" within the meaning of Section 525.

Moreover, NextWave has conceded that cancellation of a license for a debtor's failure to fulfill obligations of an "executory contract"—defined as one " 'on which performance remains due to some extent on both sides,' "—would not violate Section 525. Br. in Opp. 17-18 (quoting H.R. Rep. No. 95-595, at 347). That is because Section 365 of the Bankruptcy Code requires a debtor either to reject such contracts or (in certain circumstances) accept their conditions. *See* 11 U.S.C. § 365; *id.* § 1107(a) (debtor-in-possession may exercise powers of trustee). NextWave has argued that cancellation of a license for failure to perform an executory condition would not violate Section 525 regardless of whether the debtor rejected or accepted the alleged contract.[7]

Even if NextWave's licenses can be considered contracts subject to the Bankruptcy Court's jurisdiction rather than nondischargeable regulatory conditions—and they should not be—the relationship between NextWave and the FCC is plainly executory, because NextWave owed payment and other duties, and the FCC owed NextWave various reciprocal duties, including the duty to prevent interference on

[7] According to NextWave, if a debtor rejected such a contract, cancellation would not violate Section 525 because "the FCC would have no obligation to perform its side of the contract," and if the debtor were allowed to reaffirm the contract, cancellation would likewise not violate Section 525 because the reaffirmed debt would not be "dischargeable." Br. in Opp. at 18 & n.8.

NextWave's frequencies. *See, e.g.*, 47 U.S.C. § 309(j)(1); 47 C.F.R. § 1.80. Indeed, in the analogous area of patent licenses, such licenses have been held to be executory because the licensor has the continuing obligation not to sue for infringement. *See, e.g., Everex Sys., Inc.* v. *Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 677 (9th Cir. 1996). Thus, under NextWave's *own* view of the law, the FCC's cancellation of NextWave's license would not violate Section 525.[8]

For these reasons, the FCC's determination to enforce its regulatory policy by recognizing the automatic cancellation of NextWave's licenses was not undertaken solely because of NextWave's failure to pay a debt that is dischargeable in bankruptcy. Obviously, NextWave owed the Government a substantial debt. And once NextWave surrenders its licenses and is no longer subject to the FCC's regulatory authority, the Bankruptcy Court could deal with that debt in the bankruptcy case with NextWave's other debts. The Second Circuit recognized as much. *See* Pet. App. 237a (if NextWave's licenses are returned to the FCC, "[a] bankruptcy court [could] resolve resulting financial claims that the FCC has

[8] If NextWave's licenses were considered contracts, NextWave would be required to reject them under Section 365. Section 365 prevents a debtor from assuming an executory contract if applicable law would prevent the debtor from assigning its obligations under the contract. 11 U.S.C. § 365(c)(1)(a) (preventing assumption when "applicable law excuses a party, other than the debtor, to such contract * * * from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession"). Because both the federal Anti-Assignment Act, 41 U.S.C. § 15, and the Communications Act, 47 U.S.C. § 310(d), prevent NextWave from assigning its licenses, NextWave could not assume an executory license agreement under Section 365. *See, e.g., United States* v. *TechDyn Sys. Corp. (In re TechDyn Sys. Corp.)*, 235 B.R. 857 (Bankr. E.D. Va. 1999) (contracts that cannot be assigned under Anti-Assignment Act cannot be assumed under Section 365).

against NextWave as it would the claims of any government agency seeking to recover a regulatory penalty or an obligation on a debt"). But the regulatory payment condition—the reason the licenses were cancelled—is not a dischargeable debt in bankruptcy while NextWave still holds the license. That condition is a regulatory requirement which, although connected to the underlying debt, is separate from it. And the only way that regulatory condition could conceivably be "discharged" is by modifying NextWave's license terms, which no bankruptcy court has the power to do.[9]

Accordingly, the cancellation of NextWave's licenses did not occur solely because NextWave failed to pay a dischargeable debt. And in any event, even if NextWave's underlying debt were somehow deemed dischargeable while NextWave held its licenses—which it should not be—the

---

9 The D.C. Circuit recognized that, as the Second Circuit had held, "insofar as timely payment was a condition for license retention, the bankruptcy court had no authority to modify it." Pet. App. 42a. But the court nevertheless held that the license condition constituted a dischargeable debt under Section 525 even while NextWave retained the licenses because the Second Circuit "never decided that a court of competent jurisdiction (such as this one) could not modify or discharge it *under Section 525*." *Id.* (emphasis added). That holding misreads Section 525. For a cancellation to come within its scope, Section 525 requires that a debt be presently dischargeable under some *other* provision of the Bankruptcy Code "in the case under this title." 11 U.S.C. § 525(a). The D.C. Circuit's conclusion that invalidation under *Section 525* in a *different* case can satisfy the dischargeability requirement of that same section is tautological. A court of appeals has no jurisdiction to discharge a debt. *See* 28 U.S.C. § 1334(a) (district courts have "original and exclusive" jurisdiction over "all cases under title 11"); 11 U.S.C. § 1141(d)(1) (providing such courts with authority to discharge debts). Yet as even the D.C. Circuit seemed to recognize, the only court with such jurisdiction in this case—the Bankruptcy Court—had no power to relieve NextWave of its timely-payment condition so long as it held its licenses.

cancellation was not "solely because" of NextWave's failure to pay the debt itself, but rather because of the unchallenged regulatory policies served by the payment condition.

II. THE DECISION BELOW IS INCONSISTENT WITH THE STRUCTURE AND LEGISLATIVE HISTORY OF THE BANKRUPTCY CODE.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). A court must interpret a statute "as a symmetrical and coherent regulatory scheme," *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569 (1995), "fit[ting], if possible, all parts into an harmonious whole." *FTC* v. *Mandel Bros.*, 359 U.S. 385, 389 (1959). Here, the D.C. Circuit's decision is inconsistent with the structure of the Bankruptcy Code, most notably Section 362(b)(4), which permits government entities to take regulatory action against a debtor notwithstanding the debtor's filing of bankruptcy.

Section 362(b)(4) is an exception to the Code's "automatic stay," 11 U.S.C. § 362(a), which otherwise prohibits various actions against debtors without bankruptcy court approval. Section 362(b)(4) exempts from the stay various efforts by governmental units—such as acts to obtain possession of or exercise control over estate property, *id.* § 362(a)(3)—where such acts are taken "to enforce such governmental unit's or organization's police or regulatory power." *Id.* § 362(b)(4). *See Board of Governors* v. *MCorp Fin., Inc.*, 502 U.S. 32, 39-40 (1991). As the Second Circuit held, any act the FCC may have taken to cancel NextWave's licenses was exempt from the automatic stay because the FCC was "[u]ndoubtedly

* * * a governmental unit that is seeking 'to enforce' its 'regulatory power.' " Pet. App. 125a.[10]

The automatic stay affords debtors a broad "breathing spell," S. Rep. No. 95-989, at 54-55 (1978), H.R. Rep. No. 95-595, at 340, by preventing various acts against debtors upon a bankruptcy filing, even if a bankruptcy court might later authorize the act. Given that Congress exempted the regulatory cancellation of NextWave's licenses from the broad scope of the automatic stay, it makes no sense to interpret Section 525 to flatly prohibit that same action. The D.C. Circuit's principal rationale for holding otherwise—that the language of Section 525 "clearly and explicitly prohibits

---

[10] In *dicta*, the D.C. Circuit opined that Section 362(b)(4) might not apply to the cancellation because the FCC had taken protective security interests in NextWave's licenses and the regulatory power exception does not exempt actions to "enforce liens against property of the estate." 11 U.S.C. § 362(a)(4), (5). *See* Pet. App. 40a-41a. But the fact that the FCC took protective security interests in NextWave's licenses makes no difference. If the FCC had not taken such interests, cancellation of NextWave's licenses surely would not have been an action to "enforce" a lien. The result should be no different simply because the FCC, out of an abundance of caution, took such interests to protect its "resulting financial claims," Pet. App. 237a, which would be resolved *after* NextWave's licenses were returned. Indeed, NextWave's own security agreement with the FCC provided that the security interest was "not in derogation of any of the Commission's regulatory authority over the License." Pet. App. 403a-404a.

In any event, the cancellation did not implicate the automatic stay provisions involving liens because the cancellation was automatic and thus did not involve any affirmative "act" against the debtor. 11 U.S.C. § 362(a)(4), (5). *See FAA* v. *Gull Air, Inc. (In re Gull Air, Inc.)*, 890 F.2d 1255 (1st Cir. 1989) (automatic withdrawal of airline landing slots did not violate automatic stay); *United States* v. *Kansas Personal Communications Servs., Ltd.*, 256 B.R. 807 (D. Kan. 2000) (automatic cancellation of debtor's spectrum licenses did not violate automatic stay).

governmental units, for *whatever* reason, from canceling licenses for failure to pay a dischargeable debt," Pet. App. 39a (emphasis in original)—is mistaken. As shown above, the statute only prohibits cancellation when the failure to pay a dischargeable debt is the *sole* reason. Thus, interpreting Section 525 to allow cancellations based at least in part on regulatory reasons does not "amount[] to a request for a regulatory purpose exception to section 525," as the D.C. Circuit concluded. *Id.* at 43a. Rather, such an interpretation follows the plain language of the statute, is fully consistent with Section 362(b)(4), and promotes harmony within the entire statutory scheme. NextWave's interpretation, by contrast, promotes discord by presuming that Congress intended to exempt from the automatic stay license cancellations for regulatory reasons while at the same time completely prohibiting those same cancellations under Section 525.

The legislative history of Section 525 confirms this reading of the statute. As the both the House and Senate Reports note, Section 525 "does not prohibit consideration of other factors" not listed in the statute, "such as future financial responsibility or ability." H.R. Rep. No. 95-595, at 367; S. Rep. No. 95-989, at 81. As the House Report notes:

> [t]he prohibition does not extend so far as to prohibit examination of the factors surrounding the bankruptcy * * * or the examination of prospective financial condition or managerial ability. * * * *[I]n those cases where the causes of a bankruptcy are intimately connected with the license,* * * *an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate actions without running afoul of bankruptcy policy.* [H.R. Rep. No. 95-595, at 165 (emphasis added).]

This history thus makes clear that Congress did not intend to prevent a government agency from canceling a license based on reasons not among those enumerated in the statute—and specifically "where the causes of the bankruptcy

are intimately connected with the license." *Id.* That must include not only lack of "future financial responsibility or ability," *id.* at 367; S. Rep. No. 95-989, at 81, but also, as here, the fact that a debtor may not be "the applicant most likely to use the [l]icense[] efficiently for the benefit of the public." Pet. App. 45a (quotation omitted). Because Congress wanted to leave government agencies free "to pursue appropriate regulatory policies and take appropriate actions," H.R. Rep. No. 95-595, at 165, its use of the term "solely" makes perfect sense.

The D.C. Circuit found the statute's legislative history unpersuasive because it "do[es] not state that an agency may use timely payment of a dischargeable debt as the sole indicator of [financial] responsibility." Pet. App. 46a. But it is precisely when the "causes of the bankruptcy are intimately connected with the license"—*e.g.*, when a licensee's past default shows that it is presently unfit to hold the license—that Congress intended to permit government agencies to pursue appropriate regulatory policies by canceling the license. By permitting consideration of the circumstances of the bankruptcy in determining regulatory fitness, Congress could not have meant to preclude *any* reliance on the one factor—the failure to pay past debts—that causes most bankruptcies. So long as a cancellation is not "solely because" of the failure to pay debts but rather serves other valid regulatory purposes, it does not run afoul of Section 525.

This reading is further confirmed by the legislative history making clear that Section 525 was specifically intended to "codif[y]" the "*Perez* situation." H.R. Rep. No. 95-595, at 165, 366-367; S. Rep. No. 95-989, at 81. *Perez* v. *Campbell*, 402 U.S. 637 (1971), involved an Arizona statute that prevented drivers whose licenses had been suspended due to unpaid traffic accident judgments from gaining reinstatement of their licenses where the judgments had been discharged in bankruptcy. *See id.* at 642 (challenged statute provided that "[a] discharge in bankruptcy following the rendering of any

such judgment shall not relieve the judgment debtor from any of the requirements of this article") (citation omitted). Rejecting the argument that the law furthered regulatory purposes apart from the collection of debts, the Court held that "[t]he sole emphasis in the Act is one of providing leverage for the collection of damages." *Id.* at 646. As the Court noted, the statute had the "declared purpose to protect judgment creditors 'from financial hardship' by giving them a powerful weapon with which to force bankrupts to pay their debts despite their discharge." *Id.* at 654. The Court held that this law conflicted with the Bankruptcy Code's policy of allowing debtors a "fresh start."[11]

This case is nothing like the "*Perez* situation" that Congress intended to codify in Section 525. The FCC is not using the failure to pay a debt unrelated to the license grant as a "powerful weapon" to coerce NextWave into paying that debt. *Id.* Far from it. Unlike the *Perez* situation, the FCC enforced NextWave's license conditions not as leverage to collect a debt but rather to serve its regulatory goal of allocating spectrum licenses to those most likely to serve the public interest in furthering efficient, effective, and timely service and the rapid development of new technologies. Indeed, once NextWave failed to comply with its license conditions, the FCC was not particularly interested in collecting the money owed by NextWave. Instead, it rejected NextWave's offer of a lump-sum payment and insisted on enforcing the automatic cancellation requirement in order to further its critical regulatory objectives. *Perez* makes clear that Section

---

[11] The Court held that the statute did not serve the purpose of deterring negligent motorists because, among other reasons, negligent motorists against whom no judgment was entered could gain reinstatement of their licenses through voluntary agreements with their victims or other means. *Id.* at 647-648 & n.12.

525 was never intended to permit a licensee to frustrate important regulatory purposes of this sort.[12]

The official title of Section 525—"Protection against discriminatory treatment"—further confirms this understanding. *See, e.g., Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (title of statute and heading of section are proper aids for determining meaning of statute). The statute was plainly intended to prevent *discrimination* against debtors. As in *Perez*, revoking or denying a license for failure to pay a dischargeable debt unrelated to the license itself discriminates against debtors because it penalizes them for exercising their right to discharge debts in bankruptcy. But a uniform policy of revoking or denying licenses whenever a licensee has failed to satisfy regulatory requirements—including requirements connected with payments owed for the licenses themselves—in no way discriminates against debtors.[13] NextWave, by contrast, seeks to "pervert § 525(a) by turning

---

[12] *See Smith* v. *St. Louis Hous. Auth. (In re Smith)*, 259 B.R. 901, 906 (BAP 8th Cir. 2001) ("Section 525 does not operate to cure [debtor's] contractual defaults and does not require the [agency] to continue its contractual relationship with her."); *In re Bacon*, 212 B.R. 66, 75-76 (Bankr. E.D. Pa. 1997) (under Section 525 governmental unit "is free to exercise its contractual rights so long as it does not seek to collect the dischargeable debt"); *Spruce Ltd. P'ship* v. *Lutz (In re Lutz)*, 82 B.R. 699, 704 (Bankr. M.D. Pa. 1988) ("Section 525 does not * * * prevent a governmental unit from taking actions which are not discriminatory and which are not based on an intent to collect a discharged debt.").

[13] *See In re Lutz*, 82 B.R. at 705 (Section 525 "is aimed at discriminatory treatment by governmental units. It does not cure contractual defaults and does not require governmental units to continue a contractual relationship with a debtor when, pursuant to the terms of that contract, the prepetition default constitutes cause for terminating the contractual relationship."); *accord Robinson* v. *Chicago Hous. Auth., (In re Robinson)*, 169 B.R. 171, 176-177 (N.D. Ill. 1994), *aff'd*, 54 F.3d 316 (7th Cir. 1995).

it into a sword rather than a shield." *In re James*, 198 B.R. at 889. It seeks to force the FCC to discriminate in its *favor* by granting it something a non-debtor cannot have: a license to use the Nation's valuable airwaves without timely paying what it bid, notwithstanding the FCC's determination that such a license disserves the public interest.

III. THE DECISION BELOW IS INCONSISTENT WITH THE COMMUNICATIONS ACT AND DISSERVES THE PUBLIC INTEREST.

The D.C. Circuit's contrary reading of Section 525 not only upsets the balance of the Bankruptcy Code itself, but also needlessly sets the Bankruptcy Code at war with the Communications Act. *See Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts * * * to regard each as effective."). The D.C. Circuit's holding that the Bankruptcy Code forces the FCC to leave licenses in the hands of an entity the agency has determined is not serving the public interest simply cannot be reconciled with Congress' clear intent that the *FCC*—not individual licensees or bankruptcy courts—be the exclusive arbiter of whether the issuance and retention of spectrum licenses serves the public interest.

As noted, "Congress assigned to the Federal Communications Commission . . . *exclusive* authority to grant licenses" to use the radio spectrum. *Metro Broad.*, 497 U.S. at 553. Thus, as this Court has held, "no court can grant an applicant an authorization which the Commission has refused." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942). In order for license to be awarded, "it is the Commission, *and not the courts*, which must be satisfied that the public interest will be served." *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946) (emphasis added). *See also Red Lion*, 395 U.S. at 375 n.4. Under the D.C. Circuit's decision, however, the determination of who is entitled to a license is no longer made by the agency charged by Congress with the exclusive authority

to allocate licenses, but by individual licensees aided by bankruptcy judges applying bankruptcy law.

When it authorized competitive bidding as a means of license allocation, Congress continued the role of the FCC as the exclusive arbiter of the public interest. *See* 47 U.S.C. § 309(a) ("the Commission shall determine, in the case of each application filed with it [for a license], whether the public interest, convenience, and necessity will be served by the granting of such application"). The manner in which the FCC determines fitness to hold a license, however, did change. Rather than determining fitness in advance through individualized comparative hearings, Congress—and the FCC in implementing Congress' will—placed their faith in market forces, establishing a strong national policy of using auctions to allocate licenses. *See* 47 U.S.C. § 309(j)(1). This expressed Congress' view that competitive bidding "*will ensure that spectrum is used more productively and efficiently than if handed out for free.*" H.R. Rep. No. 103-111, at 249 (emphasis added).

This method for determining the public interest, however, only works if the spectrum is not "handed out for free." Under the auction regime, the ability and willingness of a licensee to pay for use of the public spectrum becomes the central means for determining whether that licensee is serving the public interest. As the Second Circuit explained, the auction mechanism can achieve "fair and efficient allocation of spectrum licenses * * * only if the bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue." Pet App. 246a. "If the transaction can be adjusted in bankruptcy proceedings so that the high bidder takes the license without paying the amount of the high bid, the auction as a mechanism for determining valuation is impaired." *Id.* Indeed, the FCC recognized as much when it declined to allow financially troubled C block bidders to retain their licenses for less than they had bid. *See* 12 F.C.C.R. 16436 ¶ 19.

The D.C. Circuit's interpretation thus severely undermines the integrity of the auction system. It allows individual licensees and bankruptcy courts to override the FCC's exclusive role as the arbiter of the public interest, thereby impermissibly "grant[ing] an applicant an authorization which the Commission has refused." *Scripps-Howard Radio*, 316 at 14. And it does so by preventing the FCC from relying on what is now perhaps the most critical factor in determining that public interest: the ability of a licensee to pay. The ultimate loser, of course, is the public. Here, for example, after receiving its licenses NextWave declared bankruptcy and "provid[ed] no service." Pet. App. 82a. This action has indisputably impeded Congress's goals of promoting "the development and rapid deployment of new technologies, products, and services," and the "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3)(A), (D). As the FCC found, "NextWave's failure to utilize the spectrum and its attempts to shield the spectrum in bankruptcy have hindered the growth of innovative and competitive telecommunications services * * * to the detriment of the American public." Pet. App. 82a.

Meanwhile, the agency has been prevented from awarding the licenses to other entities that stand ready to use those licenses responsibly to further congressionally-mandated objectives. The magnitude of the harm to the public is staggering. Spectrum worth more than *$15 billion* has lain fallow for more than five years, at a time when there is a critical shortage of spectrum resources. *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, FCC 02-33, App. B ¶ 35 (Feb. 6, 2002). There is, of course, no way to manufacture new spectrum frequencies, and ANW and VoiceStream are vitally interested in obtaining their licenses in large part because the frequencies now being hoarded by NextWave are among the last usable frequencies available to the burgeoning PCS

wireless industry. *See* Bennett Z. Kobb, *Wireless SPECTRUM Finder* 213-224 (2001). NextWave is entitled to a "fresh start" by declaring bankruptcy, but it is not entitled to hold the public interest and the FCC's regulatory programs hostage in the process.

The D.C. Circuit's answer to this blatant conflict with the policies of the Communications Act—that the FCC was not required to utilize installment payments, Pet. App. 50a—is no answer at all. Congress expressly directed the FCC to consider the use of installment payments, 47 U.S.C. § 309(j)(4)(A), in part to further the Act's other goal of "disseminating licenses among a wide variety of applicants, including small businesses." *Id.* § 309(j)(3)(B). The FCC determined that allowing installment plans would further the public interest, yet the D.C. Circuit's interpretation effectively sounds the death knell for this regulatory tool, thereby narrowing the variety of future applicants.[14]

And in any event, the D.C. Circuit's interpretation is not limited to licenses held under installment plans (hundreds of which are still in effect). The FCC continues to award licenses by auction. Because the FCC is statutorily obligated to ensure that a winning bidder is qualified to hold a license before granting it to the bidder, *see* 47 U.S.C. § 309(j)(5), there is often a significant delay between the close of an auction and the time that the bidder's payment becomes due

[14] Indeed, the FCC decided to suspend its installment payment program precisely because of the delay and uncertainty caused by the bankruptcy process. *See In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 13 F.C.C.R. 15743 ¶ 50 (1998). As the FCC noted, Congress's objective "to speed service to the public cannot be achieved when licenses are held in abeyance in bankruptcy court." *Id.*

and the license is awarded.[15] Yet under the D.C. Circuit's interpretation, Section 525 would prohibit the FCC from "deny[ing]," 11 U.S.C. § 525(a), a license to any high bidder that declared bankruptcy after the auction but before the license grant and refused to make good on its bid. Now that the FCC has discontinued future installment plans, this scenario is all the more likely, since bidders must now make payments up front and in full.

This rule would not only frustrate the FCC's goal of allocating spectrum to those who will use it efficiently for the benefit of the public, but would also undermine the credibility of the auction process. *See* 12 F.C.C.R. 16436 ¶ 19 (FCC determination that allowing bidders to retain licenses for less than they bid "would be very unfair to other bidders," and would "gravely undermine the credibility and integrity" of the auction system). It allows bidders to "game" the system by outbidding others who value the spectrum at realistic financial levels and would in fact fulfill their bids, and then—as NextWave and other bidders have successfully managed to do—seek to have their payment obligations adjusted or eliminated in bankruptcy.[16] In this way, bidders

[15] For example, in the re-auction ANW was designated as the winning bidder for certain licenses not previously held by NextWave, but was not finally awarded those licenses for thirteen more months, due to a legal challenge the FCC eventually found groundless. *See Applications of Alaska Native Wireless, L.L.C. File Nos. 0000364320 and 0000363827, Auction No. 35 - C & F Block PCS*, No. DA-504 (WTB Mar. 4, 2002); Public Notice, *Wireless Telecommunications Bureau Grants 15 C and F Block Broadband Personal Communications Services (PCS) Licenses to Alaska Native Wireless, L.L.C.*, No. DA 02-589 (WTB Mar. 11, 2002).

[16] For example, in *United States* v. *GWI PCS 1, Inc.*, 245 B.R. 59, 61 (N.D. Tex. 1999), *aff'd*, 230 F.3d 788 (5th Cir. 2000), *cert. denied*, 533 U.S. 964 (2001), GWI PCS 1, Inc.—the second largest C-block license holder—successfully persuaded the bankruptcy

could obtain valuable rights to the public airwaves at a discount, which they could then seek to use or transfer for huge profits. Petitioners hope to be repeat players in the auction process, but they will have to reevaluate their future participation if financially irresponsible applicants are allowed to distort bid price levels and then use bankruptcy to avoid paying what they unrealistically bid. If allowed, this type of auction environment would discourage reasonable, prudent bidders from participating and, ultimately, produce less revenue for the Treasury.

The FCC, moreover, is by no means the only government agency whose regulatory authority is threatened by the D.C. Circuit's interpretation of the Bankruptcy Code. Hundreds of other federal, state, and local government agencies award licenses, franchises, or "similar grant[s]," 11 U.S.C. § 525(a), conditioned in part on payment obligations designed to ensure that the public interest is served. In particular, a number of other federal agencies operate programs that allocate scarce resources through competitive bidding. Examples include the Bureau of Land Management, which awards coal, oil and gas, and other mineral leases, *see, e.g.*, 30 U.S.C. §§ 201, 226; 43 C.F.R. § 3508.11; the Bureau of Indian Affairs, which awards mineral leases on tribal lands, *see, e.g.*, 25 C.F.R. §§ 211.20; 212.20; and the Forest Service, which awards timber sales contracts. *See, e.g.*, 36 C.F.R. § 223.100. Such leases and contracts are subject to cancellation for violations of applicable law or their terms. *See, e.g.*, 30 U.S.C. § 188; 25 C.F.R. §§ 211.54, 212.54; 36 C.F.R. § 223.116. State and local governments likewise issue billions of dollars worth of franchises and similar grants conditioned on the timely payment of fees.

---

court to reduce its license payment obligations by 80 percent on fraudulent conveyance grounds. Moreover, as the FCC has noted, "[d]ozens of licensees that acquired spectrum through the auction process have filed for bankruptcy protection," tying up spectrum worth billions of dollars. FCC Cert. Reply Br. 2-3 & n1.

If the D.C. Circuit's decision is upheld, however, an agency will not be able to cancel such a lease or contract where a debtor defaults on a payment obligation, even if the agency—like the FCC here—reasonably determines in an exercise of its regulatory authority that cancellation is necessary to ensure that precious resources are put to their best use. Congress never intended for Section 525's narrow proscription against discriminatory treatment to extend this far. Contrary to Congress' intent, the D.C. Circuit's decision prevents government agencies from "pursu[ing] appropriate regulatory policies and tak[ing] appropriate action" where the causes of a bankruptcy are "intimately connected" with license obligations. H.R. No. 95-595, at 165. This Court should reverse the decision below to ensure that the FCC and other regulatory agencies retain the power to carry out the important regulatory responsibilities entrusted to them.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

MICHELE C. FARQUHAR
JONATHAN S. FRANKLIN*
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

* Counsel of Record

Counsel for Petitioners

Supreme Court, U.S.
FILED
MAY 6 2002
CLERK

Nos. 01-653 and 01-657

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.

ARCTIC SLOPE REGIONAL CORPORATION, ET AL., PETITIONERS

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY A. LAMKEN
Assistant to the Solicitor General

WILLIAM KANTER
JACOB M. LEWIS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOHN A. ROGOVIN
Acting General Counsel

DANIEL M. ARMSTRONG
JOEL MARCUS
Counsel

Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether Section 525 of the Bankruptcy Code, 11 U.S.C. 525, displaces the Federal Communications Commission's rules for congressionally authorized spectrum auctions under 47 U.S.C. 309(j), which provide that wireless telecommunications licenses obtained at auction cancel upon the winning bidder's failure to make timely payments to fulfill its winning bid.

PARTIES TO THE PROCEEDINGS

Petitioners and Appellants in the court below were NextWave Personal Communications Inc. and NextWave Power Partners Inc. Respondents and Appellees were the Federal Communications Commission and the United States of America. The following entities were intervenors:

BellSouth Corporation
BellSouth Cellular Corporation
Cellco Partnership d/b/a Verizon Wireless
VoiceStream Wireless Corporation
AT&T Wireless Services, Inc.
Cellular Telecommunications Industry Association
Dobson Communications Corporation
Sprint Spectrum L.P. d/b/a Sprint PCS
TeleCorp PCS, Inc.
Nextel Communications, Inc.
Arctic Slope Regional Corporation
Council Tree Communications, LLC

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	1
Summary of argument	14
Argument	19
Section 525 of the Bankruptcy Code does not displace the FCC's exclusive regulatory authority over spectrum licensing and the license allocation mechanism established in 47 U.S.C. 309(j)	19
I. The auction payment requirement of FCC licenses is beyond the authority of bankruptcy courts to modify	22
A. The full and timely payment requirement is a fundamental regulatory condition	22
B. Bankruptcy courts may neither exercise the Commission's authority to select licensees nor excise regulatory conditions from licenses	26
II. Section 525 of the Bankruptcy Code does not supersede the market-based licensing mechanism established in 47 U.S.C. 309(j)	29
A. Cancellation did not occur "solely because" of respondents' failure to pay a "debt that is dischargeable" in bankruptcy	29
1. Respondents' timely payment obligation under the licenses is not a debt that is dischargeable in bankruptcy	30
2. The licenses did not cancel "solely because" of non–payment of a debt	36
3. The D.C. Circuit's contrary construction of Section 525 is inconsistent with its history and purpose	40

TABLE OF CONTENTS—Continued: Page

B. The D.C. Circuit's decision distorts the structure of the Bankruptcy Code 43
C. The D.C. Circuit's decision inappropriately places Section 525 in conflict with the Communications Act 47
Conclusion 50
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Adventure Res., Inc. v. *Holland*, 137 F.3d 786 (4th Cir. 1998) 34
Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 40
Board of Governors v. *MCorp. Fin., Inc.*, 502 U.S. 32 (1991) 44
Braniff Airways, Inc., In re, 700 F.2d 935 (5th Cir. 1983) 32
Chicago, Rock Island & Pacific R.R., In re, 860 F.2d 267 (7th Cir. 1988) 34
Consolidated Gas, Elec. Light & Power Co. v. *United Rys. & Elec. Co.*, 85 F.2d 799 (4th Cir. 1936) 35
Crawford Fitting Co. v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) 21
D.H. Overmyer Telecasting Co. v. *Lake Erie Comm., Inc.*, 35 B.R. 400 (Bankr. N.D. Ohio 1983) 28, 32, 42
Duffy v. *Dollison*, 734 F.2d 265 (6th Cir. 1984) 42
FAA v. *Gull Air, Inc.*, 890 F.2d 1255 (1st Cir. 1989) 32
FCC v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940) 46
FCC v. *WOKO, Inc.*, 329 U.S. 223 (1946) 2, 22
F.L. Crowder v. *FCC*, 399 F.2d 569 (D.C. Cir. 1968) 46

Cases—Continued: Page

Federal Power Comm'n v. *Idaho Power Co.*, 344 U.S. 17 (1952) 28
Federal's, Inc. v. *Edmonton Inv. Co.*, 555 F.2d 557 (6th Cir. 1977) 35
James Cable Partners, In re., 27 F.3d 534 (11th Cir. 1994) 35
Johnson v. *Edinboro State Coll.*, 728 F.2d 163 (3d Cir. 1984) 30
Lee v. *Schweiker*, 739 F.2d 870 (3d Cir. 1984) 34
Midlantic Nat'l Bank v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494 (1986) 44
Moody v. *Amoco Oil Co.*, 734 F.2d 1200 (7th Cir.), cert. denied, 469 U.S. 982 (1984) 32
Morton v. *Mancari*, 417 U.S. 535 (1974) 21
Mountain Solutions, Ltd. v. *FCC*, 197 F.3d 512 (D.C. Cir. 1999) 5, 25, 38, 41
NLRB v. *Bildisco*, 465 U.S. 513 (1984) 33
Nathanson v. *NLRB*, 344 U.S. 25 (1952) 21
National Gypsum Co., In re, 208 F.3d 498 (5th Cir. 2000) 34, 35
P&R Temmer v. *FCC*, 743 F.2d 918 (D.C. Cir. 1984) 28
Perez v. *Campbell*, 402 U.S 637 (1971) 18
Regents of the Univ. Sys. v. *Carroll*, 338 U.S. 586 (1950) 27
Scripps-Howard Radio, Inc. v. *FCC*, 316 U.S. 4 (1942) 2, 15, 22, 27
Select-A-Seat Corp., In re, 625 F.2d 290 (9th Cir. 1980) 35
U.S. Airwaves, Inc. v. *FCC*, 232 F.3d 227 (D.C. Cir. 2000) 7
United States v. *GWI PCS1*, cert denied, 533 U.S. 964 (2000) 45

Cases—Continued: Page

Wainer v. *A.J. Equities, Ltd.*, 984 F.2d 679 (5th Cir. 1993) 35
West Virginia Univ. Hosps., Inc. v. *Casey*, 499 U.S. 83 (1991) 21

Statutes, regulations, and rule:

Administrative Procedure Act, 5 U.S.C. 701-706 31
Balanced Budget Act of 1997, Pub. L. No. 105-33, Pub. L. No. 105-33, § 3002, 111 Stat. 258 3
Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
11 U.S.C. 101(5)(A) 33
11 U.S.C. 101(12) 33
11 U.S.C. 362 ..... 43, 44
11 U.S.C. 362(a) 11
11 U.S.C. 362(a)(4) 46
11 U.S.C. 362(a)(5) 46
11 U.S.C. 362(b) 46
11 U.S.C. 362(b)(4) 11, 12, 18, 43, 44, 45, 46
11 U.S.C. 363(c) 26
11 U.S.C. 365 34
11 U.S.C. 365(b) 33
11 U.S.C. 365(b)(1)(C) 33
11 U.S.C. 525 ..... *passim*, 1a
11 U.S.C. 525(a) ..... *passim*
11 U.S.C. 544 8
11 U.S.C. 1108 26
11 U.S.C. 1141(d)(1) 31
11 U.S.C. 1141(d)(1)(A) 32
Communications Act, 47 U.S.C. 151 *et seq.*:
47 U.S.C. 301 ..... 2, 46, 48, 2a
47 U.S.C. 309 (1994 & Supp. V 1999) 3a
47 U.S.C. 309(a) 2, 22, 27
47 U.S.C. 309(i) 2
47 U.S.C. 309(j) (1994 & Supp. V 1999) ..... *passim*
47 U.S.C. 309(j)(1) (1994 & Supp. V 1999) 3
47 U.S.C. 309(j)(3)(A) 3, 22, 25, 38, 49
47 U.S.C. 309(j)(3)(B) 3
47 U.S.C. 309(j)(3)(C) 3

Statutes, regulations and rule—Continued: Page

47 U.S.C. 309(j)(3)(D) 3, 22
47 U.S.C. 309(j)(4)(A) 4, 5, 48
47 U.S.C. 309(j)(6)(C) 4, 47, 48
47 U.S.C. 309(j)(6)(D) 4, 46, 48
47 U.S.C. 309(j)(7)(B) 23
47 U.S.C. 310 ..... 11a
47 U.S.C. 402 31
Communications Amendments Act of 1982, Pub. L. No. 97-259, § 115, 96 Stat. 1094 2
Hobbs Act, 28 U.S.C. 2342 31
Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 388 3
28 U.S.C. 157(a) 32
28 U.S.C. 157(b)(1) 32
28 U.S.C. 157(b)(2)(L) 32
28 U.S.C. 1334(a) 32
47 C.F.R. (1997):
Section 1.2110(e)(4) 5-6, 24
Section 1.2110(e)(4)(iii) 6, 24
Section 24.708(a) 5, 24
Section 24.709(a)(1) 5
Section 24.711(a)(2) 5
Section 24.711(b) 5
Section 24.711(b)(3) 5
Section 24.716 5
Sup. Ct. R. 46.2 1

Legislative materials:

123 Cong. Rec. 35,673 (1977) 42
H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. (1981) 2
H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. (1993) 48
H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) 18, 30, 32, 41
H.R. Rep. No. 19, 103d Cong., 1st Sess. (1993) 2-3, 22, 50
H.R. Rep. No. 111, 103d Cong., 1st Sess. (1993) 2, 3, 22, 23, 48, 50
S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 18, 30, 41

Miscellaneous: Page

Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, In re:
12 FCC Rcd 16,436 (1997) 7, 39
13 FCC Rcd 8345 (1998) 7, 39
13 FCC Rcd 15,743 (1998) 14
14 FCC Rcd 6571 (1999) 7, 39
Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses, In re, 12 FCC Rcd 2030 (1997) 6
Countryman, *Executory Contracts in Bankruptcy,* 58 Minn. L. Rev. 479 (1973) 35
FCC Public Notice, *Wireless Telecommunications Bureau Announces June 8, 1998 Election Date for Broadband PCS C Block Licenses,* 13 FCC Rcd 7413 (1998) 8
Implementation of Section 309(j) of the Communications Act—Competitive Bidding, In re:
9 FCC Rcd 2348 (1994) 4, 5, 23, 24
9 FCC Rcd 5532 (1994) 4-5
Licenses of 21st Century Telesis, Inc., In re, 15 Rcd 25,113 (2000) 38
Longstreet Communications Int'l, Inc., In re, 12 FCC Rcd 1549 (1997) 25, 38
4 L. King, *Collier on Bankruptcy* (15th ed. 2001) 30, 37, 41
Petition of NextWave Telecom, Inc., for a Stay of the June 8, 1998 PCS C-Block Election Date, In re, 13 FCC Rcd 11,880 (1998) 8
Public Notice, D, E, and F Block Auction Closes, DA 97-81, 1997 WL 20711 (Jan. 15, 1997) 6
Requests for Extension of the Commission's Initial Non-Delinquency Period, In re, 13 FCC Rcd 22,071 (1998) 38
Requests for Refunds of Down Payments Made in Auction No. 35, In re, FCC No. 02-99, 2002 WL 464682 (released Mar. 27, 2002) 12

Miscellaneous—Continued: Page

Southern Communications Sys., Inc., In re, 12 FCC Rcd 1532 (1997) 25, 38, 41
Webster's Third New International Dictionary (1976) 39

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a)[1] is reported at 254 F.3d 130. The Federal Communications Commission's Public Notice announcing re-auction of the radio spectrum previously licensed to respondents (Pet. App. 96a-97a) is reported at 15 FCC Rcd 693, and its order denying respondents' petition for reconsideration (Pet. App. 52a-95a) is reported at 15 FCC Rcd 17,500.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2001. On September 13, 2001, the Chief Justice extended the time within which to file the petitions for a writ of certiorari to and including October 19, 2001. The petitions were filed on that date. They were granted on March 4, 2002, and the cases were consolidated. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).[2]

STATUTORY PROVISIONS INVOLVED

Section 309(j) of the Communications Act, 47 U.S.C. 309(j) (1994 & Supp. V 1999), and Section 525 of the Bankruptcy Code, 11 U.S.C. 525, are reprinted in the appendix to the petition for a writ of certiorari in No. 01-653. Pet. App. 427a-428a, 431a-469a. Pertinent statutory provisions are also reprinted for convenience in an appendix to this brief.

STATEMENT

1. The Communications Act (the Act) is designed "to maintain the control of the United States over all the chan-

---

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed by the Federal Communications Commission in No. 01-653.

[2] A petition for a writ of certiorari was also filed by Cellco Partnership, d/b/a Verizon Wireless. See No. 01-654. On February 15, 2002, that petition was dismissed pursuant to this Court's Rule 46.2.

nels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. 301. The Act establishes the Federal Communications Commission (FCC or Commission) and vests it with the authority to issue radio licenses upon its determination that doing so will serve the "public interest, convenience, and necessity." 47 U.S.C. 309(a). Because of that delegation of authority, "it is the Commission, not the courts, which must be satisfied that the public interest will be served" by authorizing an applicant to use scarce radio spectrum. *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). Consequently, "no court can grant an applicant an authorization which the Commission has refused," *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942), and no license may "be construed to create any right, beyond the terms, conditions, and periods of the license," 47 U.S.C. 301.

For many years, the FCC attempted to identify the license applicant that would best serve the public interest through comparative hearings examining the qualifications of competing applicants. Concerned about that process's "substantial delays and burdensome costs," H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981), Congress amended the Act in 1982 to authorize the FCC to award initial licenses to qualified applicants "through the use of a system of random selection," or lottery. See 47 U.S.C. 309(i); Communications Amendments Act of 1982, Pub. L. No. 97-259, § 115, 96 Stat. 1094. The lottery system also proved unsatisfactory. Among other things, it was criticized for "encouraging unproductive speculation for spectrum licenses" and failing "to reward persons who have spent money to research and develop a new technology or service." H.R. Rep. No. 111, 103d Cong., 1st Sess. 248 (1993). See also H.R. Rep. No. 19, 103d Cong., 1st Sess. 16 (1993) (lottery process "arbitrary" and produces "vast financial windfalls for speculators").

Accordingly, in 1993 Congress authorized the FCC to award initial licenses for spectrum dedicated to certain commercial services "through a system of competitive bidding," or auction. 47 U.S.C. 309(j)(1) (1994 & Supp. V 1999); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 388. Congress recognized that such a market-based system would eliminate speculation, because those who lack an efficient and immediate plan for using the spectrum generally cannot afford to submit the highest auction bid. See H.R. Rep. No. 111, *supra*, at 249. Through the auction mechanism, Congress sought to enable the FCC to further "the development and rapid deployment of new technologies, products, and services" to benefit the public, 47 U.S.C. 309(j)(3)(A), assist in the "recovery for the public of a portion of the value of the public spectrum," 47 U.S.C. 309(j)(3)(C), and promote "efficient and intensive use of the electromagnetic spectrum," 47 U.S.C. 309(j)(3)(D). Congress also intended auctions to promote license allocation "without administrative or judicial delays." 47 U.S.C. 309(j)(3)(A). In 1997, Congress mandated the use of auctions for most initial licensing proceedings. Pub. L. No. 105-33, § 3002, 111 Stat. 258.

At the same time, Congress remained "concerned that, unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries." H.R. Rep. No. 111, *supra*, at 254. Congress therefore directed the Commission to promote "economic opportunity and competition * * * by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses." 47 U.S.C. 309(j)(3)(B). Congress expressed particular concern that auctions might favor deep-pocketed "incumbents, with established revenue streams, over new companies or start-ups." H.R. Rep. No. 111, *supra*, at 255. To enable small businesses to compete, Congress gave the agency, among other tools, "flexibility to design alternative payment schedules." *Ibid.* The statute accordingly instructs the Commission, in issuing regulations, to "consider alterna-

tive payment schedules and methods of calculation, including lump sums or guaranteed installment payments." 47 U.S.C. 309(j)(4)(A).

Congress made clear that nothing in Section 309(j), or in the use of auctions, was to "diminish the authority of the Commission under the other provisions of [the Communications Act] to regulate or reclaim spectrum licenses," 47 U.S.C. 309(j)(6)(C), or "be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection," 47 U.S.C. 309(j)(6)(D).

2. After lengthy proceedings addressing implementation, the FCC decided to award licenses using simultaneous, multiple-round auctions. *In re Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 2348, ¶ 68 (1994). The FCC concluded that an auction design "that award[s] licenses to those parties that value them most highly" would best fulfill the statute's goals. *Id.* at ¶ 69. The agency explained: "Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increase the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services in each area and the efficient and intensive use of the spectrum." *Id.* at ¶ 71 (footnote omitted).

The FCC also sought to implement the statute's direction to consider installment payments and similar devices to enable small businesses and "designated entities" to participate in the industry. See 9 FCC Rcd 2348, ¶ 229. The spectrum dedicated to broadband Personal Communications Services (PCS) was divided into six auction blocks, identified by the letters "A" through "F." See *In re Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 5532, ¶ 6

(1994).[3] Participation in the "C" and "F" Block auctions was limited to small businesses and other designated entities. 47 C.F.R. 24.709(a)(1) (1997). In accordance with 47 U.S.C. 309(j)(4)(A), the Commission allowed small businesses that obtained licenses at auction to pay in installments over the term of the license. 9 FCC Rcd 2348, ¶¶ 231-240. The FCC determined that "installment payments [would] be an effective way to efficiently promote the participation of small businesses * * * and an effective tool for efficiently distributing licenses and services among geographic areas." *Id.* at ¶ 233.[4]

The Commission understood the necessity of "strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification, and reauction." 9 FCC Rcd 2348, ¶ 197. See also *Mountain Solutions, Ltd.* v. *FCC*, 197 F.3d 512, 519 (D.C. Cir. 1999). The FCC's auction rules accordingly specified that license awards "will be conditioned upon full and timely payment of the winning bid amount." 47 C.F.R. 24.708(a) (1997). For bidders electing to pay in installments, the rules provided that any "license granted * * * shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan," 47 C.F.R.

---

[3] Broadband PCS permits a "new generation of communications devices that will include small, lightweight, multi-function portable phones, portable facsimile and other imaging devices, new types of multi-channel cordless phones, and advanced paging devices with two-way data capabilities." 9 FCC Rcd 5532, ¶ 3.

[4] Applicants eligible for the C-Block auction were required to pay ten percent of their winning bid in cash by the time of the license grant, 47 C.F.R. 24.711(a)(2) (1997), with the remainder to be paid over the ten-year term of the license. 47 C.F.R. 24.711(b) (1997). For a qualifying "small business," the interest rate equaled that for ten-year Treasury obligations, with interest-only payments for the first six years. 47 C.F.R. 24.711(b)(3) (1997). Favorable terms were also available to small business bidders for F-Block licenses. See 47 C.F.R. 24.716 (1997).

1.2110(e)(4) (1997), and that, in the event of failure to make timely payments, "the license will automatically cancel," 47 C.F.R. 1.2110(e)(4)(iii) (1997).

3. Respondent NextWave Personal Communications Inc. (NPCI) was formed to participate in the FCC's auction for "C-Block" PCS licenses in the summer of 1995. NPCI was declared the high bidder for 63 C-Block licenses the following year after it submitted winning bids totaling $4.74 billion. Pet. App. 4a-5a. Respondent NextWave Power Partners Inc. (NPPI) was formed to participate in the FCC's F-Block license auction, which concluded in January of 1997. NPPI was declared the high bidder for 27 F-Block licenses after it submitted winning bids of approximately $123 million. See *id.* at 313a-314a; *Public Notice, D, E, and F Block Auction Closes*, DA 97-81, 1997 WL 20711 (Jan. 15, 1997).

In accordance with FCC regulations, respondents deposited sufficient funds to cover their downpayment obligations. Pet. App. 5a. After considering challenges to NPCI's eligibility, the FCC granted the licenses, conditioned on NPCI's compliance with an ownership restructuring plan to bring it into compliance with the FCC's foreign ownership rules and on compliance with all other regulatory conditions. See *In re Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses*, 12 FCC Rcd 2030, ¶¶ 8-9 (1997). Respondents then executed promissory notes for the balance of their bids, which were to be paid in installments. Pet. App. 313a.

Each license stated that it was "conditioned upon the full and timely payment of all monies due," and that failure to comply with that obligation "will result in the automatic cancellation" of the license. Pet. App. 388a. Separately, the Installment Plan Note executed by respondents acknowledged that the licenses were "conditioned upon full and timely payment" of respondents' obligations to the FCC. *Id.* at 393a. And the associated Security Agreements contained similar acknowledgments. *Id.* at 413a. The Security Agreements further noted that any rights created by those agreements were in addition to, not in contravention of, the FCC's regulatory powers. *Id.* at 403a-404a.

Shortly after the licenses were awarded, a number of C-Block and F-Block licensees, including respondents' parent company, petitioned the FCC to restructure their installment payment obligations, describing "a range of apparent difficulties in accessing the capital markets" because of the prices they had bid. *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 12 FCC Rcd 16,436, ¶ 11 (1997).[5] In response, the FCC temporarily suspended payment obligations for C-Block and F-Block licensees, and then adopted several options designed to aid C-Block licensees. See *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 13 FCC Rcd 8345, ¶¶ 11-15 (1998); *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 14 FCC Rcd 6571 (1999). The Commission refused, however, "to adopt proposals that result in a dramatic forgiveness of the debt owed," because to do so "would be very unfair to other bidders, and would gravely undermine the credibility and integrity of [the auction] rules." 12 FCC Rcd 16,436, ¶ 19. Accordingly, none of the restructuring options adopted by the FCC allowed C-Block licensees to keep any license for less than the full bid amount. Pet. App. 6a; see 13 FCC Rcd 8345, ¶ 8. See *U.S. Airwaves, Inc.* v. *FCC*, 232 F.3d 227, 235 (D.C. Cir. 2000) (the Commission "did not simply forgive agreed-upon payments, much less grant the winning bidders' more sweeping requests for relief").

The Commission gave C-Block licensees until June 8, 1998, to elect a restructuring option, provided that payments

---

[5] Respondents have implied that their difficulties resulted from the Commission's unexpected auction of additional licenses. See Br. in Opp. 2. That is incorrect. The Commission had planned and publicly announced additional auctions by August 1995, well before respondents submitted their winning bids. See Pet. App. 308a.

would resume by July 31, 1998, and set October 29, 1998, as the last date on which it would accept late installment payments (with a late fee). FCC Public Notice, *Wireless Telecommunications Bureau Announces June 8, 1998 Election Date for Broadband PCS C Block Licensees*, 13 FCC Rcd 7413 (1998). Respondents and others unsuccessfully sought to stay the election deadline. See *In re Petition of NextWave Telecom, Inc., for a Stay of the June 8, 1998 PCS C-Block Election Date*, 13 FCC Rcd 11,880 (1998); *NextWave Telecom Inc.* v. *FCC*, No. 98-1255, 1998 WL 389116 (D.C. Cir. June 11, 1998). Respondents did not make an election by the June 8, 1998 deadline (and were therefore deemed to have elected to resume full payment); they did not begin making the payments that were an express condition of their licenses; and they made no effort to obtain any agreement or assurance from the Commission as to the effect of their bankruptcy filing. Pet. App. 57a-58a. Instead, on June 8, 1998, respondents filed for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Meanwhile, the vast majority of other C-Block licensees made their elections by the deadline and either made payments or lost their licenses through operation of the automatic cancellation rule.

4. After filing for reorganization, respondent NPCI filed an adversary proceeding in bankruptcy court, seeking to avoid most of its payment obligation for the C-Block licenses as a constructively fraudulent conveyance under 11 U.S.C. 544. In general, a conveyance is deemed constructively fraudulent if the exchange between the debtor and other party was for less than reasonably equivalent value. Ruling in respondents' favor, the bankruptcy court held that, at the time NPCI submitted its promissory notes to the FCC, the licenses were worth less than NPCI had bid, and that roughly $3.72 billion of NPCI's $4.74 billion payment obligation should therefore be avoided as constructively fraudulent. The bankruptcy court ordered that NPCI be permitted to keep its licenses while meeting only just over $1 billion of

its $4.74 billion payment obligation. Pet. App. 357a-358a. The district court affirmed. *Id.* at 254a-272a.

The Second Circuit reversed and remanded for further proceedings, "if any are necessary." Pet. App. 253a. Although the bankruptcy court had rested its decision to alter license conditions on the theory that they concerned "solely the debtor-creditor relationship between the FCC and [NextWave]," the Second Circuit rejected that approach as "fundamentally mistaken." *Id.* at 234a-235a. Instead, the Second Circuit viewed the payment condition of respondents' licenses as quintessentially regulatory. "The FCC had not sold NextWave something that the FCC had owned," the court of appeals explained. *Id.* at 234a. Instead, the FCC "had used the willingness and ability of NextWave to pay more than its competitors as the basis on which it decided to grant the [l]icenses to NextWave." *Ibid.* Thus, "NextWave's inability to follow through on its financial undertakings had more than financial implications." *Ibid.* Rather, "[i]t indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." *Ibid.* "By holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion," the court of appeals concluded, the "bankruptcy and district courts impaired the FCC's method for selecting licensees by effectively awarding the [l]icenses to an entity that the FCC determined was not entitled to them." *Id.* at 235a. This Court denied respondents' petition for a writ of certiorari. 531 U.S. 924 (2000).

Respondents then modified their proposed reorganization plan to provide that they would pay their overdue obligation in full and pay future installments as they became due. Pet. App. 146a. In a letter to the FCC, respondents offered to pay the discounted present value of their obligations in a lump sum. *Id.* at 147a. The FCC did not accept the offer because, under FCC regulations, respondents' payment default

had caused the licenses to cancel by operation of law on October 29, 1998. *Id.* at 61a, 96a. The FCC issued a Public Notice scheduling the spectrum previously licensed to respondents for re-auction. *Id.* at 96a-97a.

On respondents' motion, the bankruptcy court declared the FCC's notice and scheduling of the spectrum for re-auction to be "null, void, and without force or effect." See Pet. App. 113a. The FCC's decision to re-auction the spectrum, the bankruptcy court held, violated the Bankruptcy Code's automatic stay, *id.* at 155a-160a, impaired respondents' right to cure their default, *id.* at 160a-163a, and potentially contravened the Code's prohibition against license revocations premised upon the nonpayment of a dischargeable debt, *id.* at 163a-168a (citing 11 U.S.C. 525). In addition, the bankruptcy court held that automatic cancellation was barred by doctrines of equitable estoppel and waiver applicable to the "government * * * act[ing] in a commercial capacity." *Id.* at 181a-191a. The bankruptcy court acknowledged that the Second Circuit had held "that there is a 'regulatory' aspect in the FCC's 'payment in full' requirement." *Id.* at 191a. But the court found "no such aspect * * * with respect to the FCC's 'timely payment' requirement," which it viewed as a matter of "pure debtor-creditor economics." *Ibid.* See also *id.* at 165a-166a.

The Second Circuit granted a writ of mandamus, directing the bankruptcy court to vacate its order and deny the relief sought by respondents. Pet. App. 102a-133a. The court of appeals observed that its earlier opinion had "held that the FCC's decision as to 'which entities are entitled to spectrum licenses under rules and conditions it has promulgated' is a paradigmatic instance of the FCC's exclusive regulatory power over licensing," *id.* at 116a, and thus beyond the bankruptcy court's authority to revise, *id.* at 108a-109a. The court of appeals rejected the bankruptcy court's conclusion that the timely payment condition in the FCC licenses and regulations was economic rather than regulatory. *Id.* at 118a. "[T]he regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time." *Id.* at 119a. The court of appeals also rejected the bankruptcy court's reliance on the Code's automatic stay provision, 11 U.S.C. 362(a). The court emphasized that the automatic stay is expressly inapplicable to actions to enforce a governmental unit's "police and regulatory power." Pet. App. 125a. In declaring the licenses canceled for failure to meet a license condition and scheduling them for re-auction, the court of appeals held, the FCC was "[u]ndoubtedly * * * a governmental unit * * * seeking 'to enforce' its 'regulatory power.'" *Ibid.* (citing 11 U.S.C. 362(b)(4)). The court of appeals concluded that "[t]he bankruptcy court lacked jurisdiction to declare the Public Notice null and void on any ground." *Id.* at 127a. This Court again denied certiorari. 531 U.S. 1029 (2000).

5. Respondents filed a petition with the FCC, urging it to reconsider its decision that the spectrum would be re-auctioned. Pet. App. 63a. The FCC denied the petition, finding that the license cancellation was "fully consistent" with the statute and regulations, and that the full and timely payment requirement was "paramount" in preserving "the reliability and integrity" of the auction program. *Id.* at 65a-66a. The FCC ruled that respondents' contention that the Bankruptcy Code precluded cancellation had been rejected by the Second Circuit's mandamus opinion and was therefore barred by res judicata. *Id.* at 83a. The FCC also ruled that neither estoppel nor waiver prohibited it from enforcing its cancellation rule. *Id.* at 83a-88a. Respondents sought review of the FCC's decision in the Court of Appeals for the District of Columbia Circuit.

While respondents' challenge to the Commission's action was pending before the D.C. Circuit, the Commission completed its re-auction of the spectrum at issue, along with other C- and F-Block spectrum. In the re-auction, the spectrum covered by the licenses formerly held by respon-

dents produced bids of $15.85 billion, well over three times the $4.74 billion respondents had originally bid, and almost 15 times the just over $1 billion value respondents and the bankruptcy court had assigned to it in bankruptcy proceedings. See Pet. App. 302a, 357a-358a; pp. 8-9, *supra*.[6]

On June 22, 2001, the D.C. Circuit reversed the FCC's license cancellation decision and remanded the case to the agency. The court rejected the FCC's contention that respondents' Bankruptcy Code arguments had been resolved against them by the Second Circuit. Pet. App. 22a-36a. In the court's view, the Second Circuit merely held "that the Commission's license cancellation was a regulatory act reviewable only by a court of appeals under section 402 of the Communications Act, and thus that the bankruptcy court lacked *jurisdiction* to apply the Code to these acts." *Id.* at 24a (emphasis added). However, the court agreed that the Second Circuit's decision barred NextWave from contesting that the FCC's actions fell within the regulatory power exception to the automatic stay, 11 U.S.C. 362(b)(4), in light of the Second Circuit's unequivocal ruling on that issue. Pet. App. 34a, 125a-127a.

---

[6] The successful bidders in the re-auction paid more than $3 billion to the FCC as deposits pending issuance of the licenses. In response to a joint request for a refund, the FCC recently agreed to return 85% of their downpayments temporarily. *In re Requests for Refunds of Down Payments Made in Auction No. 35*, FCC No. 02-99, 2002 WL 464682 (released Mar. 27, 2002). The FCC explained that its refund would "give the bidders access to the bulk of their money" during this litigation while "at the same time preserv[ing] the integrity of the auction" by allowing the Commission to "retain sufficient money to cover any future default payments." *Id.* at ¶ 13. The Commission made clear, however, that if it prevailed in these proceedings, the "winning bidders" in the re-auction "will be required to pay the full amount of their winning bids or be subjected to default payments under [its] rules." *Ibid.* On April 8, 2002, Verizon Wireless filed suit challenging the Commission's refusal to refund the full amount of its downpayment and release it from its obligations. *Cellco Partnership d/b/a Verizon Wireless* v. *FCC*, Nos. 02-1110, 02-1111 (D.C. Cir. filed Apr. 8, 2002); see also *Cellco Partnership d/b/a Verizon Wireless* v. *United States*, No. 2-280C (Ct. Fed. Cl. filed Apr. 4, 2002) (seeking damages).

On the merits, the D.C. Circuit held that Section 525 of the Bankruptcy Code, 11 U.S.C. 525, precluded cancellation of respondents' licenses. Section 525 provides that a governmental unit may not revoke a license "solely because" a debtor "has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. 525(a). The D.C. Circuit rejected the FCC's contention that "NextWave's license fee obligation was not a 'dischargeable' debt * * * because the Second Circuit * * * held * * * that so long as NextWave retained its licenses, its payment obligation was subject to neither modification nor discharge in bankruptcy." Pet. App. 41a. The D.C. Circuit read the Second Circuit's decisions as having "merely decided that insofar as timely payment was a condition for license retention, the bankruptcy court had no authority to modify it." *Id.* at 42a. In the D.C. Circuit's view, the Second Circuit "never decided that a court of competent jurisdiction (such as this one) could not modify or discharge [the timely payment condition] under section 525." *Ibid.*

The D.C. Circuit also rejected the FCC's argument that cancellation of respondents' licenses had not occurred "solely because" of respondents' failure to pay a debt within the meaning of Section 525. Pet. App. 44a-46a. The court did not dispute that the purpose of cancellation was to preserve the integrity of the auction process and select the licensee most likely to use the spectrum efficiently for public benefit. *Id.* at 44a-45a. But it concluded that, although "the Commission had a regulatory motive for examining NextWave's timely payment record and canceling its licenses on that basis," the licenses were canceled "solely because" of respondents' default because the FCC relied on non-payment as the triggering event for cancellation. *Id.* at 45a-46a.

The D.C. Circuit had "no doubt that in developing its installment payment plan, the Commission made a good faith effort to implement Congress's command to encourage small businesses with limited access to capital to participate in PCS auctions." Pet. App. 48a. The appeals court also agreed

that "allowing NextWave to retain its licenses may be 'grossly unfair' to losing bidders and licensees who 'complied with the administrative process and forfeited licenses or made timely payments despite their financial difficulties.'" *Ibid.* Ultimately, however, it characterized the Commission as having "enter[ed] a creditor relationship with winning bidders." *Id.* at 50a. The court thus held that "section 525 prevents the Commission, whatever its motive, from canceling the licenses of winning bidders who fail to make timely installment payments while in Chapter 11." *Id.* at 49a.[7]

In the wake of the D.C. Circuit's decision, respondents filed a disclosure statement in the bankruptcy court relating to a second plan of reorganization, to which the government objected. That plan is premised on the assumption that respondents would retain the licenses and pay the FCC the full amount of their original bid. No date has been set for a hearing on the disclosure statement or confirmation of the plan of reorganization. On March 29, 2002, the bankruptcy court extended respondents' exclusive period for soliciting acceptance of a reorganization plan until September 30, 2002. That date will likely be extended in light of the proceedings before this Court.

SUMMARY OF ARGUMENT

I. A. In Section 309(j) of the Communications Act, 47 U.S.C. 309(j), Congress established a market-based system of auctions for allocating licenses to use scarce radio spectrum. That congressional action reflected a determination

[7] In light of the protracted bankruptcy litigation over the PCS licenses, the FCC has suspended its installment payment program, explaining that the statutory objective "to speed service to the public cannot be achieved when licenses are held in abeyance in bankruptcy court." See *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 13 FCC Rcd 15,743, ¶ 50 (1998). The Commission remains free, under the statute, to reinstate its installment payments program if conditions warrant. In any event, several hundred licenses with installment payment conditions (in addition to those issued to respondents) remain outstanding.

that an entity's willingness and ability to pay the most for the license demonstrates its ability to use the spectrum most effectively and efficiently in the public interest.

The bidder's willingness and ability to stand behind its winning bid is the linchpin of the license auction process. Only if the bid is an accurate reflection of the bidder's valuation of the spectrum can the auction achieve a fair and efficient allocation of licenses. If the bidder can alter or modify its obligation after the auction's conclusion, the auction method of allocating licenses is fatally undermined. Bids would no longer reflect willingness to pay or true valuation. FCC spectrum licenses are therefore conditioned on full and timely payment of winning bid amounts, and licenses automatically cancel for noncompliance with that condition. That condition also ensures that spectrum can be quickly recovered and re-auctioned, so that it does not lie fallow for extended periods contrary to Congress's express intent.

B. The requirements of full and timely payment are thus fundamentally regulatory. Under the auction approach, failure to make a timely payment indicates that the spectrum was not optimally licensed and therefore triggers cancellation and prompt reallocation. Consequently, the full and timely payment condition lies beyond the authority of bankruptcy courts to modify or alter. As this Court has explained, only the Commission is empowered to allocate radio spectrum in the public interest. "[N]o court can grant an authorization which the Commission has refused." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942). Here, respondents' winning bids and promises to make timely payments were the basis on which they were awarded their licenses over competing applicants. Their failure to make good on those undertakings violated the terms of their licenses and divested them of the right to retain them to the exclusion of others. Bankruptcy courts are not empowered to edit FCC licenses to delete the very condition that was most critical to the FCC's decision that the public interest

would best be served by allocating the spectrum to a particular license-holder.

II. Notwithstanding those principles, the D.C. Circuit held that Section 525 of the Bankruptcy Code, 11 U.S.C. 525, allows a licensee to void a spectrum license's timely payment condition by filing for bankruptcy. That ruling ignores the textual limits of Section 525, as well as that provision's purpose and history; it conflicts with the overall structure of the Bankruptcy Code; and it would inappropriately turn Section 525 into an obstacle to the accomplishment of Congress's goals under the Communications Act.

A. Section 525 prohibits a governmental unit from discriminating against those who have sought bankruptcy protection. It thus provides that a governmental unit may not, among other things, revoke a license "solely because" a debtor "has not paid a debt that is dischargeable" in bankruptcy. 11 U.S.C. 525(a). That provision is inapplicable for at least two reasons: the payment conditions of FCC licenses are not "dischargeable," much less "debts" that are dischargeable in bankruptcy, and cancellation did not occur "solely because" of failure to pay such a debt.

1. The FCC has properly conditioned continued enjoyment of spectrum licenses on the regulatory condition of full and timely payment. Because that condition is regulatory, it is not "dischargeable." It cannot be modified by a bankruptcy court, through discharge or otherwise, so long as respondents hold the licenses. Instead, as the Second Circuit properly recognized in this controversy, only the FCC, not the bankruptcy courts, has the authority to modify regulatory conditions of spectrum licenses. So long as the licensee retains its license—and thereby remains subject to the FCC's regulatory jurisdiction—the regulatory conditions of those licenses are not subject to discharge in bankruptcy.

Indeed, the regulatory payment condition of an FCC license is not itself a "debt" within the meaning of Section 525. Under the Bankruptcy Code, a debt is a liability on a claim, and a claim is a right to payment. The license condition may cause the licenses to cancel on non-payment, but does not itself give the FCC the right to compel payment. Section 525, in any event, prohibits discrimination against bankrupts. It does not permit parties to avoid neutral regulatory requirements by entering bankruptcy. Nor does it allow bankrupts to enjoy exclusive governmental privileges on special terms enjoyed by no one else—terms set by bankruptcy courts rather than the responsible regulatory agency. That comports with the principle that the Bankruptcy Code does not expand property or other rights, and with the Code's preservation of agency regulatory authority.

2. It is also dispositive that respondents' licenses did not cancel "solely because" respondents failed to pay a debt. Instead, they canceled because respondents failed to satisfy a fundamental regulatory condition established long before they entered bankruptcy—a condition designed to ensure that they are the applicants that will best use the spectrum in the public interest. In placing the full and timely payment condition in spectrum licenses, the FCC's interest was not solely, or even chiefly, financial. The auction process seeks to allocate spectrum licenses by identifying the applicant most likely to advance the public interest through efficient use of the spectrum. Under the system Congress established in Section 309(j), respondents' failure to fulfill their winning bid obligations belied the regulatory implications of that winning bid, and demonstrated that the public interest would not be served by their exclusive use of the spectrum. The FCC, moreover, specifically examined the circumstances that led to respondents' noncompliance with the license condition and determined that the public interest would not be served by allowing respondents to retain the licenses despite that noncompliance.

3. Section 525's structure, its legislative history, and related provisions of the Bankruptcy Code also demonstrate that Section 525 does not forbid the FCC from enforcing nondiscriminatory regulatory requirements. Section 525 is a "[p]rotection against discriminatory treatment" of debtors,

as its title suggests. Its legislative history clarifies that "consideration of * * * future financial responsibility," S. Rep. No. 989, 95th Cong., 2d Sess. 81 (1978), or examination of "the causes of a bankruptcy" where they "are intimately connected with the license," H.R. Rep. No. 595, 95th Cong., 1st Sess. 165 (1977), is entirely proper. Here, a licensee's refusal or inability to stand behind its winning bid is a crucial indicator that it is not likely to put the licenses to their highest and best use, without delay, in the public interest.

B. The D.C. Circuit's construction of Section 525 is also inconsistent with the structure of the Bankruptcy Code, which generally exempts proceedings by a governmental unit to enforce its "police and regulatory power" from the automatic stay. 11 U.S.C. 362(b)(4). The FCC's license cancellation was plainly an action by a governmental unit to enforce its regulatory power within that statutory exemption—as the Second Circuit expressly held. Section 525 was designed to address efforts to frustrate the bankruptcy laws, such as the state statute addressed in *Perez* v. *Campbell*, 402 U.S. 637 (1971). It should not be read to frustrate companion provisions of the Code by prohibiting precisely the sort of regulatory activity that Section 362(b)(4) is designed to permit. Indeed, by so reading Section 525, the D.C. Circuit invited precisely the sort of bankruptcy court intrusion into regulatory matters against which this Court has repeatedly admonished.

C. Finally, the D.C. Circuit's decision would bring the Bankruptcy Code into needless conflict with the Communications Act. That court's holding that Section 525(a) prohibits the FCC from canceling licenses allocated by auction for failure to fulfill the central regulatory condition of full and timely payment would render the most important consideration in licensee selection—the applicant's willingness to pay more than others—the least enforceable. It would thus undermine the allocation system established by Section 309(j) by awarding licenses to entities that will not use them to the greatest public benefit; and it would cause spectrum to be

tied up in protracted bankruptcy litigation rather than being placed into immediate service.

It is a fundamental principle that, where possible, one federal statute should not be interpreted in a manner that obstructs the functioning of another. Contrary to that principle, the decision below inappropriately disregarded textually persuasive constructions of Section 525 that would accommodate that provision to the text and policies of the Communications Act, in favor of a construction that places those provisions in irreconcilable conflict.

ARGUMENT

SECTION 525 OF THE BANKRUPTCY CODE DOES NOT DISPLACE THE FCC'S EXCLUSIVE REGULATORY AUTHORITY OVER SPECTRUM LICENSING AND THE LICENSE ALLOCATION MECHANISM ESTABLISHED IN 47 U.S.C. 309(j)

Through 47 U.S.C. 309(j), Congress directed the FCC to adopt a market-based system of spectrum allocation that awards licenses to the applicant best able to use the spectrum effectively and efficiently in the public interest. Congress did not direct the FCC to "sell" spectrum or licenses. Instead, Congress adopted auctions as "an efficient regulatory regime" that allocates scarce radio spectrum to its "most productive uses," because those entities that will use spectrum most productively will generally also be willing to pay the most for it. Pet. App. 107a, 228a. That mechanism can operate effectively, however, "only if the high bid entails *the obligation to make good* the amount bid." *Id.* at 246a (emphasis added). FCC spectrum licenses are therefore conditioned on compliance with all payment obligations, and breach of that condition has "more than financial implications." *Id.* at 109a, 234a. As the Second Circuit held, such noncompliance belies the information conveyed by the winning bid; it indicates that the applicant, despite its bid, is "not the applicant most likely to use the [l]icenses efficiently" in the public interest. *Ibid.*

The question before the Court is whether the general anti-discrimination provision in Section 525 of the Bankruptcy Code invalidates and displaces the Communications Act's rules for license allocation under Section 309(j). Section 525(a), by its terms, protects bankrupt debtors against "discriminatory treatment" by, among other things, prohibiting governmental units from "deny[ing], revok[ing], suspend[ing], or refus[ing] to renew a license" to "a person that is or has been a debtor under this title * * * solely because such bankrupt or debtor * * * has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. 525(a). While Section 525 bars discrimination, it does not mandate that government except bankrupts from the operation of neutral regulatory conditions designed to ensure that exclusive rights are accorded only when it serves the public interest. Nonetheless, the decision below held that Section 525(a) precludes cancellation of an FCC spectrum license upon failure to make timely payment of regulatory bid amounts on which licenses are expressly conditioned. That decision needlessly places Section 525(a) in irreconcilable conflict with the auction regime Congress established in Section 309(j). Because a winning bidder's willingness and ability to pay more than others is the principal basis for the FCC's decision to select it as the best licensee in the public interest, a licensee's failure to meet that undertaking fatally undermines the regulatory judgment underlying the award of spectrum. Accordingly, spectrum auction rules and FCC licenses make it clear that continued enjoyment of licenses is conditioned on timely and full payments. Yet, under the court of appeals' decision, the FCC cannot enforce that regulatory condition.

Nothing in Section 525(a) compels that result. The full and timely payment condition in FCC licenses does not discriminate against licensees that have been bankrupt or enter bankruptcy. It merely establishes a neutral regulatory requirement. It is a fundamental canon of statutory construction that statutes, where possible, should be construed so as

to prevent them from obstructing one another. See *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). Cf. *Nathanson* v. *NLRB*, 344 U.S. 25, 30 (1952) ("wise administration * * * demands that the bankruptcy court accommodate itself to the administrative process"). See also *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (specific statute not to be controlled or nullified by general one). As this Court has explained, federal courts should adopt the "permissible meaning" of an ambiguous statute "which fits most logically and comfortably into the body of both previously and subsequently enacted law," not because that precise "accommodative meaning" was necessarily "what the lawmakers must have had in mind," but because it is the role of the federal courts "to make sense rather than nonsense out of the *corpus juris*." *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100-101 (1991).

In contravention of those principles, the decision below needlessly renders the law self-contradictory, rejecting a persuasive construction of Section 525 that accommodates that provision to the specific requirements of the Communications Act and the auction regime established in 47 U.S.C. 309(j). Section 525(a) by its terms is inapplicable *unless* the license is refused or reclaimed "*solely because*" of a failure to pay a "*debt that is dischargeable*" under the Bankruptcy Code. The condition in an FCC license requiring a licensee to meet its regulatory bid obligations is not a "debt that is dischargeable" in bankruptcy. To the contrary, the license condition is not even properly construed as a debt; and so long as the licensee holds its license, the terms of the license (including payment requirements) are beyond the authority of bankruptcy courts to modify or discharge. Moreover, where an FCC license cancels for failure to meet a regulatory payment condition, cancellation does not occur "solely because" of the licensee's failure to pay a "debt" within the meaning of Section 525. Rather, cancellation occurs primarily because of the licensee's noncompliance with license

conditions, which demonstrates that it is *not* the applicant that will best use the license in the public interest

I. The Auction Payment Requirement Of FCC Licenses Is Beyond The Authority Of Bankruptcy Courts To Modify

For more than 60 years, the Communications Act has accorded the FCC exclusive authority to grant telecommunications licenses if the "public interest, convenience, and necessity would be served thereby." 47 U.S.C. 309(a). "[I]t is the Commission, not the courts, which must be satisfied that the public interest will be served" in the grant of a license. *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). "[N]o court can grant an applicant an authorization which the Commission has refused." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942).

A. The Full And Timely Payment Requirement Is A Fundamental Regulatory Condition

In Section 309(j) of the Communications Act, Congress established a market-based mechanism for ensuring that the grant of spectrum licenses serves the public interest. The statute directs the FCC to employ a system of competitive bidding to award spectrum licenses in a manner that furthers "the development and rapid deployment of new technologies, products and services" to benefit the public, 47 U.S.C. 309(j)(3)(A), and promotes "efficient and intensive use of the electromagnetic spectrum," 47 U.S.C. 309(j)(3)(D). "Because new licenses would be paid for," the legislative history states, "a competitive bidding system will ensure that spectrum is used more productively and efficiently than if handed out for free." H.R. Rep. No. 111, 103d Cong., 1st Sess. 249 (1993). See H.R. Rep. No. 19, 103d Cong., 1st Sess. 16 (1993) (competitive bidding assigns spectrum "based on economic value to the user, as expressed by a willingness to pay"). As the Second Circuit observed, Congress directed the FCC to select licensees by auction in order to "direct

licenses toward those entities and technologies that would put them to the best use." Pet. App. 107a, 226a.

Echoing that "classical belief in the efficacy [of] market forces," Pet. App. 229a, the FCC likewise has determined that "auction designs that award licenses to the parties that value them most highly will best achieve" the Communications Act's goals. *In re Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 2348, ¶ 70 (1994). The Commission explained:

> Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increase the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services * * * and the efficient and intensive use of the spectrum.

Id. at ¶ 71. Thus, as the Second Circuit observed, the purpose of the auction mechanism is "to create *an efficient regulatory regime* based on the congressional determination that competitive bidding is the most effective way of allocating" scarce radio frequencies "to their most productive uses." Pet. App. 107a (emphasis added).

> The FCC was not asked to sell off the spectrum (something it did not own) in an effort to raise as much money as possible; it was not asked to develop a free-market system to maximize revenue. Instead, it was told to auction licenses to the highest bidder because such a system was thought likely to promote the development of new technologies and encourage efficient use of the spectrum, while simultaneously recouping some of the value of the spectrum for the public.

Id. at 107a, 228a-229a.[8]

---

[8] See also 47 U.S.C. 309(j)(7)(B); H.R. Rep. No. 111, *supra*, at 258 (stating that "[t]he Commission is not a collection agency" and emphasizing that "important communications policy objectives should not be sacrificed in the interest of maximizing revenues from auctions").

That market-based mechanism can achieve a "fair and efficient allocation of spectrum licenses," however, "only if the bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue" and thus "only if the high bid entails *the obligation to make good* the amount bid." Pet. App. 246a (emphasis added). As the Commission has explained, "[i]nsincere bidding * * * distorts the price information generated by the auction process and reduces its efficiency." 9 FCC Rcd 2348, ¶ 147. Absent a requirement that licensees comply with their bid obligations, applicants could, with impunity, submit bids that exceed their expected return on the spectrum on the chance that the spectrum might increase in value—thereby obtaining spectrum that other users value more highly than they do and undermining the very purpose of allocating licenses by auction. Those risks are particularly acute when a licensee opts to pay in installments because the extended time period increases the opportunities for speculation. Failure to make timely payments belies the regulatory implication of the original high bid, namely that the applicant will make the most efficient use of the spectrum. Consequently, failure to make full and timely payment has "more than financial implications." Pet. App. 109a, 234a. Instead, it "indicate[s] that under the predictive mechanism created by Congress to guide the FCC," the defaulting bidder is "not the applicant most likely to use the [l]icenses efficiently for the * * * public in whose interest they were granted." *Ibid.*

For that reason, from the outset of competitive bidding—long before any bidder entered bankruptcy—the FCC conditioned the grant of any license allocated at auction upon the "full and timely payment of the winning bid amount," 47 C.F.R. 24.708(a) (1997), and provided that if a licensee pays in installments, its licenses "shall be conditioned upon the full and timely performance of the licensee's payment obligations," 47 C.F.R. 1.2110(e)(4) (1997), and "will automatically cancel" in the event of default, 47 C.F.R. 1.2110(e)(4)(iii) (1997). Each of the licenses at issue in this case made it clear

that it was conditioned on "full and timely payment of all monies due" and that failure to comply with that requirement would "result in the automatic cancellation of" the license. Pet. App. 388a (Licenses). See also *id.* at 393a (Installment Payment Plan Note); *id.* at 409a (Security Agreement).

The full and timely payment requirements are critical not only to the integrity of the auction process as a means of identifying the best qualified licensee, but also to ensuring that spectrum is put to prompt and efficient use, as required by Section 309(j). The "[t]imeliness of such payments is a necessary indication * * * that the winning bidder is financially able to meet its obligations on the license and intends to use the license for the provision of services to the public." *In re Southern Communications Sys., Inc.*, 12 FCC Rcd 1532, ¶ 6 (1997); accord *In re Longstreet Communications Int'l, Inc.*, 12 FCC Rcd 1549, ¶ 6 (1997). The Commission's payment deadlines thus "provide an 'early warning' that a winning bidder unable to comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public." *Mountain Solutions, Ltd.* v. *FCC*, 197 F.3d 512, 518 (D.C. Cir. 1999). And providing for prompt cancellation of licenses upon failure to meet bid obligations facilitates expeditious reclamation and prompt re-auction, thereby furthering Congress's goal of "bring[ing] competitive wireless services to the public without undue delay." Pet. App. 66a. See 47 U.S.C. 309(j)(3)(A) (requiring FCC to ensure "rapid deployment of new technologies, products, and services * * * without administrative or judicial delays"). The license conditions of timely and full payment thus are "paramount to preserve the reliability and integrity of" the "auction licensing program," Pet. App. 66a, and indispensable to auction as a mechanism for "the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum," Pet. App. 119a.

B. Bankruptcy Courts May Neither Exercise The Commission's Authority To Select Licensees Nor Excise Regulatory Conditions From Licenses

Recognizing the critical role of the full and timely payment conditions in FCC licenses, the Second Circuit properly concluded that bankruptcy courts lack authority to modify or displace them. See pp. 9, 10-11, *supra*; Pet. App. 108a-109a, 232a-235a. In this case, respondents bid more than $4.7 billion for 63 FCC licenses at auction and received those licenses conditioned on timely payment of that sum, but filed for bankruptcy *before ever making an installment payment.* Respondents did not pursue the regulatory restructuring options offered by the Commission. Nor did they seek bankruptcy court authorization to make the required payments as ordinary business expenses. 11 U.S.C. 363(c), 1108. Instead, respondents asked the bankruptcy court to declare the licensing transaction "constructively fraudulent" and to order the FCC to permit them to retain the licenses—later valued at over $15 billion—for just over $1 billion, or less than one-quarter of respondents' winning bid.

As the Second Circuit properly held, that sort of relief could not be reconciled with the market-based auction mechanism Congress established in 47 U.S.C. 309(j) or, more broadly, with the FCC's exclusive authority over the terms of FCC spectrum licenses. Permitting the results of a spectrum auction to "be adjusted in bankruptcy proceedings so that the high bidder takes the license without paying the amount of the high bid" would devastatingly "impair[]" the "auction as a mechanism for determining" which applicant values the licenses most highly. Pet. App. 246a. Such a result would create clear incentives for speculation by permitting heads-I-win, tails-you-lose opportunities: If the value of the spectrum increased, winning bidders could eventually sell the license at a profit; and if the value decreased, licensees could seek to renegotiate license terms in bankruptcy court. That would deprive the auction process of its intended regulatory significance and turn it into the

very sort of speculative venture Congress sought to avoid. See pp. 2-3, *supra.*

Respondents' "willingness and ability to pay more than [their] competitors" was "the basis on which" the FCC "decided to grant" them the licenses in the public interest. Pet. App. 234a. Their failure to make good on that undertaking fatally undermined the regulatory determination that they should be awarded those licenses. *Ibid.* To maintain the integrity of the auction process and to ensure that high bidders are the most effective and efficient users of the spectrum, the FCC decided in advance to impose a timely and full payment condition on licenses. This was done not to discriminate against potential bankruptcy or to maximize receipts, but to ensure the efficacy and integrity of auctions as a mechanism for allocating spectrum licenses in the public interest.

Indeed, following lengthy notice-and-comment proceedings, the Commission concluded that it would be contrary to the public interest to permit C-Block licensees such as respondents to retain their licenses without meeting the full and timely payment conditions under which the licenses were granted. See pp. 7-8, *supra.* Bankruptcy courts have no authority (let alone expertise) to second-guess that regulatory determination. This Court has long recognized that "no court can grant an applicant an authorization which the Commission has refused." *Scripps-Howard Radio*, 316 U.S. at 14. Thus, it is the Commission and not the courts that must determine "whether the public interest, convenience and necessity will be served" by the grant of a license application, 47 U.S.C. 309(a); and it is the Commission, not the courts, that determines the license conditions that should be imposed, *Regents of the Univ. Sys.* v. *Carroll*, 338 U.S. 586, 600 (1950). Whatever might be said of a bankruptcy court's power to alter purely financial arrangements—such as debts that remain once an entity surrenders its licenses —a bankruptcy court has no authority to require the Commission to license an entity that is not qualified, Pet. App.

235a, or to excise otherwise valid regulatory conditions from a spectrum license. See *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("When the court decided that the license should issue without the conditions [imposed by the agency], it usurped an administrative function."); *D.H. Overmyer Telecasting Co.* v. *Lake Erie Comms., Inc.*, 35 B.R. 400, 404 (Bankr. N.D. Ohio 1983) ("the injunctive powers of the bankruptcy court should not be used to force a licensing agency to prefer one applicant over the other," because an "FCC license * * * is an exercise of the government's plenary power over the public airwaves"). A licensee "takes its license subject to the conditions imposed on its use." *P&R Temmer* v. *FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984). Thus, the Second Circuit properly recognized that, "insofar as timely payment was a condition for license retention, the bankruptcy court had no authority to modify it." Pet. App. 42a. See *id.* at 109a, 233a, 235a-236a.[9]

That is not to say, however, that a bankruptcy court lacks authority to address any aspect of the relationship between the FCC and respondents. As the Second Circuit observed, "[t]o the extent that the financial transactions between the two do not touch upon the FCC's regulatory authority, they are indeed like the obligations between ordinary debtors and creditors." Pet. App. 236a. Thus, once "[l]icenses are returned to the FCC, the bankruptcy court may resolve resulting financial claims that the FCC has against" a former licensee "as it would the claims of any government agency seeking to recover a regulatory penalty or an obligation on a debt." *Id.* at 237a. But, so long as a licensee retains its licenses, it remains subject to the FCC's regulatory juris-

[9] Nor does the logic of the decision below limit the scope of potential intrusion by bankruptcy courts to FCC licenses. The decision would appear to impair the ability of any government entity, state or federal, to assess and collect regulatory fees. A routine state law requiring that a driver pay a set fee to renew a driver's license or license plates, or lose them as a result, could be subject to revision and renegotiation in bankruptcy.

diction, and the regulatory conditions of its licenses remain beyond bankruptcy court authority to modify.

II. Section 525 of The Bankruptcy Code Does Not Supersede The Market-Based Licensing Mechanism Established in 47 U.S.C. 309(j)

Respondents no longer seriously dispute that the full and timely payment conditions on their licenses serve a regulatory purpose that is independent of any financial interest the FCC might have in payment. Instead, respondents now argue (and the court of appeals agreed) that Section 525 of the Bankruptcy Code prevents their licenses from canceling for failure to meet those regulatory conditions. That construction of Section 525, however, is contradicted by its language, purpose, and history. It creates an inappropriate conflict between the Bankruptcy Code and the Communications Act. It converts a provision designed to prevent discrimination against bankrupts into a guarantee of uniquely favorable treatment for them. And it contravenes the structure of the Bankruptcy Code, which declines to displace agency regulatory authority with bankruptcy rules designed to address purely financial relationships.

A. Cancellation Did Not Occur "Solely Because" Of Respondents' Failure To Pay A "Debt That Is Dischargeable" In Bankruptcy

Entitled "Protection against discriminatory treatment," Section 525 of the Bankruptcy Code provides that, except as provided in certain statutes:

> [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title * * * solely because such bankrupt or debtor is or has been a debtor under this title * * * has been insolvent before the

> commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. 525(a). Section 525 was intended to "codif[y] the result of *Perez* v. *Campbell*, 402 U.S. 637 (1971)." S. Rep. No. 989, 95th Cong., 2d Sess. 81 (1978). In that case, this Court held that a State cannot, consistent with the fresh-start policy of federal bankruptcy law, "refuse to renew a driver's license because a tort judgment resulting from an automobile accident had been unpaid as a result of a discharge in bankruptcy." *Ibid.*; accord H.R. Rep. No. 595, 95th Cong., 1st Sess. 165 (1977). *Perez* thus involved a state law that discriminated against persons who had previously sought bankruptcy protection; the law frustrated the purpose of federal law by attempting to deny full effect to a bankruptcy court's discharge of a debt.

1. *Respondents' Timely Payment Obligation Under The Licenses Is Not A Debt That Is Dischargeable In Bankruptcy.* By its terms, Section 525 provides that a governmental agency may not revoke or refuse to issue a license "solely because" a debtor in bankruptcy "has not paid a debt that is dischargeable" under the Bankruptcy Code. Thus, if a particular obligation is not subject to discharge in bankruptcy, Section 525 does not apply. See, *e.g.*, *Johnson* v. *Edinboro State Coll.*, 728 F.2d 163, 165 (3d Cir. 1984); 4 L. King, *Collier on Bankruptcy* ¶ 525.02, at 525-5 (15th ed. 2001) (*Collier*). Because the payment obligations in the FCC licenses are regulatory conditions on respondents' right to hold the spectrum licenses, they are not debts, let alone debts that are dischargeable in bankruptcy. To the contrary, as explained above and as the Second Circuit twice concluded, such license conditions constitute regulatory obligations *beyond the authority of bankruptcy courts* to alter or modify. See pp. 9, 10-11, 26-29, *supra*. See also Pet. App. 109a ("Even where the regulatory conditions imposed on a

license take the form of a financial obligation, the bankruptcy and district courts lack jurisdiction to interfere in the FCC's allocation."). Accord, *id.* at 236a, 238a. Simply put, such obligations are not "debts" that are "dischargeable" in bankruptcy, as bankruptcy courts have no authority to excise from an FCC license any regulatory condition—much less the condition that was most critical in selecting the licensee over other applicants in the first instance.

a. The D.C. Circuit nowhere disputed that bankruptcy courts lack authority to discharge or delete the timely payment condition from FCC spectrum licenses while the licenses continue in force. Instead, the court of appeals suggested that the D.C. Circuit, as another "court of competent jurisdiction" could "modify or *discharge it under section 525*." Pet. App. 42a (emphasis added). The D.C. Circuit fundamentally misread Section 525. Section 525 is not itself a discharge provision; it nowhere authorizes any court to discharge debts. Instead, Section 525 prohibits discrimination against debtors in bankruptcy by specified means. It leaves the issue of dischargeability *vel non* to other provisions of the Bankruptcy Code.

There is, moreover, no basis for the D.C. Circuit's suggestion that it can "discharge" debts within the meaning of Section 525. The D.C. Circuit has authority to review actions of the FCC in a proper case under the Administrative Procedure Act, see 5 U.S.C. 701-706, the Hobbs Act, 28 U.S.C. 2342, and the Communications Act, 47 U.S.C. 402. But Section 525, by its terms, applies only if the debts are "dischargeable *in the case under this title*," *i.e.*, in the case under the Bankruptcy Code. 11 U.S.C. 525(a) (emphasis added). The matter before the D.C. Circuit was not "a case under" the Bankruptcy Code, and the D.C. Circuit identified no provision of the Bankruptcy Code that would authorize it to grant a discharge. To the contrary, for cases like respondents' under Chapter 11, there is but one discharge provision, Section 1141(d)(1), which provides that confirmation of the plan of reorganization "discharges the debtor from any

debt that arose before the date of such confirmation." 11 U.S.C. 1141(d)(1)(A). The D.C. Circuit is not a court empowered to confirm a plan of reorganization under Chapter 11, and thus cannot "discharge" a debt under Chapter 11. To the contrary, "original and exclusive" jurisdiction over "all cases under title 11" is vested in the district courts, 28 U.S.C. 1334(a), which may, pursuant to 28 U.S.C. 157(a), refer such cases to "the bankruptcy judges for the district." See also 28 U.S.C. 157(b)(1) and (2)(L).

b. Any claim that the regulatory payment condition of FCC licenses is a "debt that is dischargeable" while the licensee retains the licenses is also inconsistent with fundamental principles of bankruptcy law. As a general matter, the Bankruptcy Code does not create rights, but merely preserves them; bankruptcy courts thus ordinarily may not permit a debtor to retain a license where, under a fundamental condition of the license itself, the debtor is not entitled to it. Cf. *FAA* v. *Gull Air, Inc.*, 890 F.2d 1255, 1261-1262 (1st Cir. 1989) (court could not, under bankruptcy law, preserve rights granted by the FAA where those rights expired by operation of law); *Moody* v. *Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir.) (bankruptcy law does not create property rights where they would not otherwise exist), cert. denied, 469 U.S. 982 (1984); *In re Braniff Airways, Inc.*, 700 F.2d 935, 941-942 (5th Cir. 1983) (similar); H.R. Rep. No. 595, *supra*, at 367 (the Code's property provisions do not "expand the debtor's rights against others more than they exist at the commencement of the case"). In this case, any right to the licenses was, for regulatory reasons, conditioned on respondents' making timely payments. Thus, so long as respondents retain the licenses, bankruptcy courts are without authority to discharge that condition. *D.H. Overmyer*, 35 B.R. at 403 ("Any attempt by a licensee or permit holder to use bankruptcy proceedings to limit the discretion of the regulatory body would be an attempt to enhance the debtor's property rights, contrary to the purpose of the Code."). The bankruptcy court had no more authority to

allow respondents to retain the licenses despite failure to make timely payments than the court could void other regulatory provisions of respondents' licenses, such as the requirement that they actually build out a communications network by the prescribed deadline.

For similar reasons, regulatory conditions like the full and timely payment condition are not properly classified as "debts." The financial nature of a condition—particularly a regulatory condition—does not convert that condition into a debt. To the contrary, the term "debt" has a specialized meaning under the Bankruptcy Code. It means "liability on a claim." 11 U.S.C. 101(12). A claim, in turn, is defined as a "right to payment." 11 U.S.C. 101(5)(A). Whatever rights the FCC might have had to payment under FCC rules or the promissory note or security agreements that respondents executed, the FCC had no right to demand payment *under the spectrum licenses* themselves. The licenses would cancel if the licensee failed to make timely payment. But the FCC could not invoke the license condition to force the licenseholder to make payment and thereby retain the license.

The nondischargeability of license conditions is confirmed by analogy to the Bankruptcy Code's treatment of executory contracts. In general, a contract is "executory" if "performance remains due to some extent on both sides." *NLRB* v. *Bildisco*, 465 U.S. 513, 522 n.6 (1984). Under 11 U.S.C. 365(b), a debtor may "assume" and thereby retain the benefits of such a contract *only if* it cures all defaults and provides "adequate assurance of future performance"; otherwise, the contract must be "rejected," which releases the counterparty from performance and leaves it with a claim for breach. See 11 U.S.C. 365(b)(1)(C). It is well established that a debtor cannot simultaneously seek "discharge" of its obligation to make payments under such an agreement while retaining the benefits thereof; instead, the debtor must either assume contractual duties along with contractual benefits, or reject the contract in whole. *Bildisco*, 465 U.S. at 531 ("Should the debtor * * * elect to assume the execu-

tory contract, however, it assumes the contract *cum onere*"); *In re National Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000) ("[A]n executory contract may not be assumed in part and rejected in part. * * * Where the debtor assumes an executory contract, * * * the debtor accepts both the obligations and the benefits of the executory contract."). Accord *In re Chicago, Rock Island & Pacific R.R.*, 860 F.2d 267, 272 (7th Cir. 1988); *Adventure Res., Inc.* v. *Holland*, 137 F.3d 786, 798 (4th Cir. 1998). In other words, "a debtor may not assume the favorable aspects of a contract * * * and reject the unfavorable aspects of the same contract." *Lee* v. *Schweiker*, 739 F.2d 870, 876 (3d Cir. 1984). Likewise, respondents' regulatory obligations cannot be eliminated—they are not "dischargeable" in bankruptcy—while respondents keep the licenses.

Respondents concede that, if a debtor retains benefits under an executory agreement, the debtor's obligations do *not* constitute a "debt that is dischargeable" in bankruptcy, and Section 525 does not apply. Br. in Opp. 17-18 & n.8 (where bidder assumes contract, the resulting obligation is post-petition and not "dischargeable" in bankruptcy). Yet they offer no reason why the same principle does not apply here. Simply put, to the extent respondents retain their licenses and the benefits provided thereby, the payment obligations contained in those licenses are not dischargeable. Cf. *National Gypsum*, 208 F.3d at 507 ("the discharge power of § 1141(d) does not reach out to extinguish" obligations under assumed executory contracts). Indeed, if the spectrum licenses at issue here were mere "contracts" and the FCC's interest merely financial rather than regulatory, the licenses unquestionably would be "executory" within the meaning of Section 365.[10] As a result, under respondents'

[10] Under FCC licenses, performances are owed by both the licensee and the FCC. While respondents must obey FCC rules and make the required payments, the FCC must protect respondents' exclusive right to the spectrum and refrain from authorizing others to use that spectrum. Courts generally conclude that analogous exclusive licensing arrangements, made by private parties for commercial reasons, are "executory." See, *e.g.*, *In re Select-A-Seat Corp.*, 625 F.2d 290, 292 (9th Cir. 1980) (software license executory where licensor was "under a continuing obligation not to sell its software packages to other parties" and the licensee was obligated to make payments); *In re James Cable Partners*, 27 F.3d 534, 537 (11th Cir. 1994) (cable franchise agreement).

own theory, the payment obligation would *not* be dischargeable so long as respondents retained the licenses.[11]

There is no reason the congressionally authorized regulatory conditions in FCC licenses should be any more dischargeable in bankruptcy than such contractual obligations. To the contrary, given the critical regulatory role those conditions serve in the license allocation scheme Congress established in 47 U.S.C. 309(j), their non-dischargeability should follow *a fortiori*. Any other understanding would convert Section 525 from a prohibition on discrimination against bankrupts into authorization for uniquely favorable treatment for debtors, allowing them to retain licenses without meeting the regulatory conditions of entitlement. The Code does not allow debtors to retain regulatory licenses while discharging regulatory obligations any more than it allows them to retain the benefits of executory contracts free from their burdens.

c. Ultimately, the claim that the payment condition of respondents' licenses is subject to "discharge" even as re-

[11] For similar reasons, duties under executory contracts—like the regulatory payment conditions at issue here—are not "debts" where the contracts remain in force. To the contrary, no "claim" arises unless and until the debtor "rejects" such a contract, surrendering all rights thereunder. See *National Gypsum*, 208 F.3d at 508; *Consolidated Gas, Elec. Light & Power Co.* v. *United Rys. & Elec. Co.*, 85 F.2d 799, 804 (4th Cir. 1936) (claim under "executory contract does not arise * * * until the contract has been rejected"). Accord *Wainer* v. *A.J. Equities, Ltd.*, 984 F.2d 679, 685 (5th Cir. 1993); *Federal's, Inc.* v. *Edmonton Inv. Co.*, 555 F.2d 577, 581 (6th Cir. 1977). And, "[a]bsent a claim, there can be no liability on a claim and, thus, no debt." *Wainer*, 984 F.2d at 685. See p. 33, *supra*. See also Countryman, *Executory Contracts in Bankruptcy*, 58 Minn. L. Rev. 479, 561-562 (1973) (courts generally conclude that "nonaction," *i.e.*, failure to assume or reject executory contract, "means nondischargeability").

spondents hold the licenses is another manifestation of respondents' persistent efforts to retain licenses on terms and conditions other than those established by Congress and the FCC. Respondents were initially awarded the licenses over other applicants based on their promise to pay $4.7 billion. Before serving a single customer or making an installment payment, respondents filed for bankruptcy, labeled their bid obligations "constructively fraudulent," and urged the bankruptcy court to permit them to retain the licenses for just over $1 billion—less than one-fourth of their original bid, and approximately eight percent of the more-than $15 billion at which the spectrum was valued in a later re-auction. Respondents, moreover, actually obtained a bankruptcy court order permitting them to do so. Pet. App. 254a, 272a. Only after the Second Circuit rebuffed that effort and held that respondents could not retain their licenses without meeting all regulatory license conditions did respondents become willing to make payment in full.

Despite that newfound willingness, respondents continue to argue that the *timely* payment condition of their licenses is not enforceable because the required payments are "dischargeable" under bankruptcy law. But, for the same reason respondents cannot retain their licenses for less than the full bid amount in contravention of 47 U.S.C. 309(j), the FCC's rules, and the terms of their licenses, respondents' payment obligations under their licenses are not "debt[s]" that are "dischargeable" in bankruptcy. Instead, so long as respondents retain the licenses, they remain subject to the regulatory conditions thereof—regulatory conditions that a bankruptcy court may not discharge or excise from the licenses.

2. *The Licenses Did Not Cancel "Solely Because" Of Non-Payment Of A Debt.* The court of appeals' reliance on Section 525(a) was mistaken for another, related reason. Section 525(a) prohibits the revocation (or refusal to issue) a license "solely because" a debtor in bankruptcy proceedings has not paid a debt that is dischargeable under the Bankruptcy Code. If the revocation is based on a regulatory

condition that does not discriminate against bankrupts and has a regulatory purpose distinct from the mere fact that a debt remained unpaid, it is not proscribed. 4 *Collier*, *supra*, ¶ 525.02, at 525-5.

a. Here, respondents' licenses did not cancel "solely because" respondents had failed to pay a "debt." Pet. App. 45a. To the contrary, respondents' licenses canceled because respondents failed to comply with a regulatory condition set well before respondents entered bankruptcy and that did not discriminate against them for entering bankruptcy. The condition required timely and full payment without regard to a licensee's relationship to the bankruptcy courts. A licensee in bankruptcy that has made or makes full and timely payment (and meets all other regulatory requirements) keeps its license, while a licensee that fails to render payment loses its license even if not in bankruptcy.

Moreover, this is not a case where the license condition and the government's insistence thereon is motivated solely or even primarily by fiscal concerns or hostility to the bankruptcy laws. To the contrary, the FCC enforces the full and timely payment condition for regulatory reasons. The purpose of the auctions was to select a single applicant, to the exclusion of all others, to use particular spectrum to serve the public. The bids were sought not for the purpose of improving the government's financial posture, but rather because the bids, although expressed in financial terms, are the means by which the Commission ensures that the prospective licensee will best employ the licenses in the public interest. Pet. App. 235a. Because the bid is the central regulatory mechanism used to identify the "best" licensee from among competing applicants, the bidder's failure to make payment in a timely fashion is fatal to its implicit representation that it is the "best" of the potential licensees. The failure to fulfill the winning bid obligations on time thus has "more than financial implications," *id.* at 234a; it signifies that the bidder's representation that it was willing and able to pay more than the other bidders does not hold true, and

thus that the basis on which the FCC decided to issue the license does not hold true either, *ibid.*

Moreover, as the Commission has explained, "[t]imeliness of such payments is a necessary indication * * * that the winning bidder is financially able to meet its obligations on the license and intends to use the license for the provision of services to the public." *Southern Communications*, 12 FCC Rcd 1532, ¶ 6; accord *Longstreet Communications*, 12 FCC Rcd 1549, ¶ 6. Consequently, the Commission's payment deadlines "provide an 'early warning' that a winning bidder unable to comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public." *Mountain Solutions*, 197 F.3d at 518. Finally, the license condition ensures that spectrum can be quickly reauctioned and is not left fallow for years on end in contravention of 47 U.S.C. 309(j)(3)(A). For those reasons, cancellation did not occur "solely because" of respondents' failure to pay a "debt" that is "dischargeable." It occurred principally because respondents' breach of a fundamental condition of licensure fatally undermined the claim that respondents are the best applicant to hold the licenses—just as it would if respondents failed to meet build-out requirements or violated other material license conditions. The FCC thus has repeatedly declined to waive the timely payment condition, even though that might have been contrary to the FCC's own pecuniary interests. See, *e.g.*, *In re Requests for Extension of the Commission's Initial Non-Delinquency Period*, 13 FCC Rcd 22,071 (1998); *In re Licenses of 21st Century Telesis, Inc.*, 15 FCC Rcd 25,113 (2000).

b. The D.C. Circuit did not dispute that the FCC had a valid, non-financial regulatory motive for allowing respondents' licenses to cancel. See Pet. App. 45a. The D.C. Circuit, however, rejected reliance on the FCC's regulatory purpose because, in its view, motive is irrelevant; Section 525(a) applies, the court stated, whenever failure to make timely payment is the "sole" and "reflexive" trigger for license cancellation. *Ibid.* That reasoning is incorrect. First,

the phrase "solely because" is properly read as referring to the agency's purpose or motive. Section 525, it must be recalled, is a prohibition on discrimination. In that context, the phrase "solely because" is most sensibly read as referring to the purpose or reason for the act. See *Webster's Third New International Dictionary* 194 (1976) (defining "because" as "for the reason that"). Second, respondents' licenses did not, in fact, cancel "reflexively." The FCC conducted a lengthy proceeding to investigate the difficulties encountered by C-Block licensees such as respondents, and to determine whether the public interest would be served by excusing them from the payment conditions of their licenses. *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 12 FCC Rcd 16,436, ¶ 11 (1997). During that proceeding, the FCC temporarily *suspended* payment obligations for C-Block and F-Block licensees—which prevented automatic cancellation—and adopted several options designed to aid such licensees. See 13 FCC Rcd 8345, ¶¶ 11-15 (1998); 14 FCC Rcd 6571 (1999). However, the FCC ultimately declined "to adopt proposals that result in a dramatic forgiveness" of bid obligations, because to do so "would be very unfair to other bidders, and would gravely undermine the credibility and integrity of [the auction] rules." 12 FCC Rcd 16,436, at ¶ 19. The FCC again considered the effect on auction integrity and the public interest when respondents sought reconsideration of the cancellation of their licenses. Pet. App. 79a-83a. And the FCC again concluded that "the public interest in maintaining the integrity of the license process through auctions, the need to ensure that licenses are allocated to those licensees that are best qualified to hold them, and" the need to "further competition" precluded it from relieving respondents of the timely payment license condition. *Id.* at 80a. Manifestly, therefore, license cancellation did not occur "solely because" respondents failed to pay. It occurred because of that failure *plus* the FCC's repeated regulatory determinations that allowing respondents to retain their

licenses—despite failure to meet the fundamental condition that enabled them to obtain the licenses over all other applicants in the first instance—would be contrary to the public interest the Commission is statutorily required to pursue.

The court of appeals' reasoning also conflates regulatory license conditions (embodied in the spectrum licenses) and a licensee's financial obligations (embodied in promissory notes, other financial documents, and certain FCC regulations). The licenses establish full and timely payment as a regulatory license condition, and that condition exists only so long as the licensee retains the license. In this case, moreover, respondents are not objecting to an FCC effort to *secure* payment, but rather to the FCC's refusal, on regulatory grounds, to allow respondents to retain the licenses even though respondents have now decided they are willing to pay. The Commission's decision to enforce the timely payment license condition is thus a regulatory decision, not a means of collecting past-due sums. It is the means by which the FCC ensures that each license is awarded to the applicant that will best use the spectrum in the public interest. Consequently, respondents' licenses did not cancel "solely because" respondents failed to pay a debt. The licenses canceled primarily because, under the system of license allocation established by Congress in Section 309(j) and implemented by the FCC, respondents had proved themselves *not* to be the entites best able to use the spectrum in the public interest.

3. *The D.C. Circuit's Contrary Construction Of Section 525 Is Inconsistent With Its History And Purpose.* As Section 525's title—"Protection against discriminatory treatment"—and its origins in this Court's *Perez* decision demonstrate, Section 525 is primarily concerned with "discrimination" against bankrupts that inappropriately interferes with the fresh-start policy of the Bankruptcy Code. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (heading of statutory provision permissible aid to construction). Section 525 thus "does not prohibit consideration of

other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily." S. Rep. No. 989, *supra*, at 81. Likewise, "where the causes of a bankruptcy are intimately connected with the license * * * an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy." H.R. Rep. No. 595, *supra*, at 165. Thus, where an agency merely enforces a nondiscriminatory financial requirement—one that is applicable whether or not a party has filed for bankruptcy—such as requiring "financial responsibility in a particular licensing process," Section 525(a) "is not applicable." 4 *Collier*, *supra*, ¶ 525.02, at 525-5.

The FCC's timely payment requirement serves just such a purpose. As explained above, the "timeliness" of payment "is a necessary indication * * * that the winning bidder is financially able to * * * and intends to use the license for the provision of services to the public," *Southern Communications*, 12 FCC Rcd 1532, ¶ 6, and the breach "provide[s] an 'early warning' that a winning bidder * * * may be financially unable to meet its obligation to provide service to the public," *Mountain Solutions*, 197 F.3d at 518. The FCC, moreover, looked specifically at the circumstances of the C-Block bidders and respondents and determined that, under the public interest standard, respondents should not be permitted to retain the licenses without meeting all regulatory conditions. See p. 39, *supra*.

To prohibit license cancellation under such circumstances is inconsistent with Section 525's purpose, which is to bar discrimination that might prevent debtors from rehabilitating themselves. Section 525 ensures that an enterprise (or individual) that otherwise satisfies all regulatory requirements for a business or professional license may continue, in competition with or on the same terms as all others, to conduct that business notwithstanding failure to pay a dis-

charged or dischargeable debt. For example, in *Perez* itself, this Court held that a State cannot refuse to issue a driver's license until a debtor satisfies a discharged tort judgment. Section 525, however, does not purport to force an agency to give an exclusive license to a business that fails to meet the key regulatory requirement for maintaining the license, much less guarantee that business exclusive rights under a regulatory scheme where competing applicants will better serve the public interest. *D.H. Overmyer*, 35 B.R. at 404 (bankruptcy law does not permit courts to use their powers "to force a licensing agency" like the FCC "to prefer one applicant over the other"); cf. *Duffy* v. *Dollison*, 734 F.2d 265, 273 (6th Cir. 1984) ("We do not believe that section 525 was intended by Congress to afford debtors in bankruptcy such preferential treatment."). To the contrary, "it was never the intention of" Congress "to interfere with legitimate regulatory objectives." 123 Cong. Rec. 35,673 (1977) (statement of Rep. Butler). Yet that is precisely the effect Section 525(a) would have under the D.C. Circuit's decision. Respondents' winning bid and undertaking to pay on time were the principal bases for awarding it the licenses over other applicants. By holding that respondents may retain the licenses to the exclusion of others despite respondents' failure to meet that critical condition, the D.C. Circuit's decision would convert Section 525 from a bar on discrimination against debtors into a rule requiring discrimination in their favor.[12]

Ultimately, the D.C. Circuit rejected the FCC's construction as "a request for a regulatory purpose exception" that does not appear in the statute. Pet. App. 43a-44a. But far

[12] In fact, the D.C. Circuit's decision would impede Section 525's fresh-start policy. If yet-unpaid license fees are treated as potentially dischargeable debts, and governments cannot deny licenses for failure to pay such debts, then governments will think twice before permitting such fees to be paid on a periodic basis. Although the requirement of up-front payment will not trouble the well-heeled, it hardly furthers the Code's interest in ensuring a fresh start.

from rejecting an effort to rely on an exception Congress never enacted, the court of appeals ended up ignoring the limits Congress actually adopted. Section 525 prohibits only those license revocations that occur "solely because of" the debtor's failure to pay a "debt that is dischargeable" in bankruptcy. As explained above (pp. 30-40, *supra*), those limits on Section 525's scope ensure that it does not interfere with FCC regulatory requirements in the public interest—because the FCC license conditions do not themselves create "debts" that are "dischargeable" while the licenses remain in force, and cancellation for failure to meet those conditions does not occur "solely because" of a failure to pay such a debt. Consequently, Congress's failure to include an express "regulatory exception" was not an expression of intent to supersede the FCC's regulatory authority or to displace the license allocation mechanism established in 47 U.S.C. 309(j). It represents Congress's understanding that such an exception was, in light of the "solely because" and "dischargeable debt" requirements, unnecessary.

B. The D.C. Circuit's Decision Distorts The Structure Of The Bankruptcy Code

The D.C. Circuit's construction of Section 525 also places that provision at odds with the structure of the Bankruptcy Code as a whole, which evidences Congress's intent to avoid interference with regulatory agency authority.

1. The Bankruptcy Code specifically addresses the relationship between regulatory action and debtor interests in Section 362, which governs the automatic stay. Section 362(b)(4) generally exempts regulatory action from bankruptcy-related interference by providing that the automatic stay of proceedings upon the filing of a bankruptcy petition does not apply to "the commencement or continuation of an action or proceeding by a governmental unit * * * to enforce such governmental unit's * * * police and regulatory power." 11 U.S.C. 362(b)(4). This Court thus has repeatedly recognized that the Bankruptcy

Code should not be construed to prevent the government from pursuing its non-creditor, regulatory interests. See, *e.g.*, *Board of Governors* v. *MCorp Fin., Inc.*, 502 U.S. 32, 40 (1991); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 507 (1986).

In *MCorp*, for example, the Court rejected the claim that bankruptcy courts "have the authority to examine the legitimacy of" an agency's actions "and to enjoin those actions." 502 U.S. at 40. As the Court explained, reading the Bankruptcy Code to "require bankruptcy courts to scrutinize the validity of every administrative or enforcement action brought against a bankrupt entity" would be "problematic, both because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the limited authority Congress has vested in bankruptcy courts." *Ibid.*

Here, the Second Circuit properly held that license cancellation falls within the regulatory exemption provided by Section 362(b)(4), finding it "[u]ndoubtabl[e]" that "the FCC is a governmental unit that is seeking 'to enforce' its 'regulatory power.'" Pet. App. 125a. The D.C. Circuit correctly considered itself bound by that ruling. *Id.* at 34a-35a. As a result, under Section 362, the FCC was permitted to enforce the regulatory cancellation condition of respondents' licenses. There is simply no reason to construe Section 525(a) as precluding precisely the sort of regulatory action that Section 362(b)(4) authorizes.

The D.C. Circuit's contrary reading of Section 525—under which license conditions constitute "debts" that are "dischargeable" in bankruptcy while the licensee retains the licensees—also invites precisely the sort of bankruptcy court intrusion on agency authority this Court found "problematic" in *MCorp*. Here, for example, the bankruptcy court was of the view that it had authority to "discharge" the payment condition of FCC licenses while ordering that respondents retain the licenses. It therefore engaged in its own *de novo* weighing of the policy interests under the Communications

Act and concluded that permitting respondents to retain the licenses—initially for a fraction of the full bid amount—would serve the "public interest" and the policies embodied in 47 U.S.C. 309(j), *notwithstanding* the FCC's contrary conclusion. See Pet. App. 286a-288a; *id.* at 267a (bankruptcy court "spent three pages of its opinion delineating how its chosen remedy would fulfill the objectives of the Bankruptcy Code and § 309(j)."). See also *id.* at 167a. Other bankruptcy courts have done likewise. See *United States* v. *GWI PCS1*, No. 00-1621 Pet. App. at 95a-96a, cert. denied, 533 U.S. 964 (2000). The public interest determination, however, is for the FCC, not a bankruptcy court, to make. Bankruptcy courts, moreover, are ill-suited to make such determinations.[13] Among other things, they may be institutionally predisposed to favor the interests of rehabilitating the debtor and protecting creditors over the broader public interest the Communications Act is designed to serve. See, *e.g.*, Pet. App. 195a ("What regulatory principle or public interest does the FCC invoke to outweigh the investment in these debtors of over $1 billion in debt and equity?"); see also *id.* at 120a.[14]

2. The D.C. Circuit did not dispute that license cancellation is "regulatory action" exempted from the automatic stay under Section 362(b)(4). Nonetheless, that court suggested

---

[13] For example, the bankruptcy court suggested that, if the licenses were re-auctioned, the bidding would only be a fraction of the $4.7 billion respondents belatedly offered to pay. Pet. App. 166a-167a; *id.* at 287a. That prediction turned out to be grossly inaccurate; the bidding exceeded $15 billion. Such an error underscores the risks of permitting bankruptcy courts to replace the license allocation mechanism established by Congress in Section 309(j) with their own *ad hoc* determinations.

[14] It would appear to follow from the D.C. Circuit's decision that Section 525 would prevent a State from collecting fees for a variety of renewable state licenses. It is troubling to imagine the interference with regulatory purposes, not to mention principles of federalism, that would flow from a bankruptcy court's evaluation of the proper fee for such licenses and determination that a neutral state license fee constitutes a fraudulent conveyance.

that cancellation of the licenses might constitute an effort to "enforce" a "lien against property of the estate" in violation of 11 U.S.C. 362(a)(4) and (5). The regulatory exception contained in Section 362(b)(4), the D.C. Circuit held, does not apply to those provisions. See Pet. App. 40a-41a; 11 U.S.C. 362(b)(4) (specifying that regulatory exception applies only to stays under "paragraph (1), (2), (3), or (6) of subsection (a)").

The court of appeals erred in attaching significance to the fact that the FCC, in addition to its traditional regulatory powers, also had liens on respondents' licenses. See Pet. App. 39a-40a; *id.* at 125a n.7. Even if the automatic stay prevents the FCC from requiring payment based on the *liens* on the licenses,[15] the full and timely payment condition of the licenses themselves nonetheless retains its character as a regulatory condition. And because that condition is regulatory, it is excepted from the automatic stay by 11 U.S.C. 362(b), as the Second Circuit expressly held. Pet. App. 125a; p. 44, *supra*.

---

[15] It is far from clear that the automatic stay applies at all. The automatic stay applies only to actions directed at "property" of the estate or the debtor. 11 U.S.C. 362(a)(4) and (a)(5). Under the Communications Act, no licensee can assert that it has a "property" interest in spectrum as against the FCC. The Communications Act makes it clear that "no person is to have anything in the nature of a property right as a result of the granting of a license." *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). The statute "provide[s] for the use of [radio] channels, but not the ownership thereof." 47 U.S.C. 301. See also 47 U.S.C. 309(j)(6)(D) (competitive bidding does not convey additional rights to licensees); *F.L. Crowder* v. *FCC*, 399 F.2d 569, 571 (D.C. Cir. 1968) ("[A] broadcast frequency is not a homestead which * * * belongs to the settler for whatever uses he desires. Rather, it belongs to the public, who through the Commission, award[s] its use to a licensee to operate consistent with the public interest."). Whatever rights respondents had by reason of the licenses as against third parties, their rights in the licenses vis-à-vis the FCC were limited by the terms and conditions under which the licenses were granted, including the full and timely payment requirement. Gov't Pet. 28 n.10.

The decision below never explained why the Commission's decision to create a lien interest in the licenses *in addition to* its regulatory powers could somehow deprive the FCC of authority to exercise its regulatory powers. Nor could it. The existence of liens did not and could not diminish the scope of the Commission's regulatory authority. To the contrary, the notes and security agreements by their own terms make clear that they do not substitute for, but instead supplement, the regulatory power embodied in the administrative rules and license conditions. Pet. App. 403a-404a.

C. The D.C. Circuit's Decision Inappropriately Places Section 525 In Conflict With The Communications Act

The D.C. Circuit's decision not only fails to comport with ordinary bankruptcy law principles, but is also irreconcilable with the market-based auction allocation mechanism Congress established in Section 309(j).

1. Under the D.C. Circuit's decision, the effect of a bankrupt licensee's failure to meet a fundamental regulatory condition in a radio spectrum license is not determined under rules established by the FCC in pursuit of the public interest. Instead, that failure becomes a matter of bankruptcy law designed to regulate debtor-creditor relations, divorced from the specific and unique public interest concerns of the Communications Act and the FCC's expertise. Nothing in either the Communications Act or the Bankruptcy Code supports, much less compels, that dramatic displacement of FCC authority in this area. To the contrary, when Congress established auctions as a mechanism for issuing spectrum licenses, it provided that "[n]othing * * * in the use of competitive bidding, shall *diminish the authority* of the [FCC] under other provisions of this chapter to *regulate or reclaim* spectrum licenses." 47 U.S.C. 309(j)(6)(C) (emphases added). And Congress further provided that the FCC's use of auctions under Section 309(j) may not "be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within

the same service that were not issued pursuant to [competitive bidding]." 47 U.S.C. 309(j)(6)(D). See also 47 U.S.C. 301 ("[N]o [FCC spectrum] license shall be construed to create any right, beyond the terms, conditions, and periods of the license."). Congress thus made clear that competitive bidding "alters only the licensing process, and has no effect on the requirements, obligations or privileges of the license holders." H.R. Rep. No. 111, *supra*, at 258.

Yet, under the D.C. Circuit's construction, the use of competitive bidding would eliminate the FCC's right to reclaim licenses for failure to meet fundamental license conditions specifically because the auction mechanism was used, *i.e.*, because the regulatory decision to issue the licenses necessarily had a financial component. In light of Congress's decision to use a market-based system for allocating spectrum, that represents a significant intrusion on the FCC's ability "to reclaim licenses," in derogation of 47 U.S.C. 309(j)(6)(C). Moreover, under the D.C. Circuit's decision, the use of competitive bidding effectively would convey additional rights to defaulting bidders—a right to retain licenses in bankruptcy despite failure to meet license conditions—that, but for the use of competitive bidding and invocation of bankruptcy-court protection, would not exist. That result conflicts not only with the express command of Section 309(j)(6)(D), but with basic principles of bankruptcy law. See pp. 32-33, *supra* (Bankruptcy Code does not enhance a debtor's property rights).

2. The D.C. Circuit dismissed the conflict between its ruling and Section 309(j) on the ground that "nothing in the Act required the Commission to choose" to permit winning bidders to pay in installments. Pet. App. 49a-50a. But Congress specifically directed the FCC to "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments" to promote small business participation. 47 U.S.C. 309(j)(4)(A). See also H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 482 (1993) ("The Commission is required to consider alternative payment schedules and methods of calculation, including initial lump sums, installment or royalty payments."). The D.C. Circuit's decision would effectively render those congressionally sanctioned means inconsistent with achievement of the statute's ends.

The D.C. Circuit's reasoning, moreover, strikes not merely at installment payments but at the core of the auction regime. Section 525 states that a governmental agency may not "revoke" or "suspend" a license solely for nonpayment of a debt dischargeable in bankruptcy. But it also states that an agency may not "deny" a license solely for nonpayment of such a debt. 11 U.S.C. 525(a). Section 525 thus draws no textual distinction between cancellation for noncompliance with an installment payment plan and denial of a license for failure to satisfy a pre-licensing payment requirement, *i.e.*, failure to come up with the bid price in the first instance. A more destructive threat to the Commission's auction process is difficult to imagine. It would not merely embroil licenses in protracted bankruptcy-related litigation, severely undermining Congress's goal of rapid deployment "without administrative or judicial delays." 47 U.S.C. 309(j)(3)(A). It would also render suspect the regulatory condition that is most central in identifying the applicant that will best use a license in the public interest. Under the auction mechanism, it is the winning bidder's willingness and ability to pay the most for the license that identifies it as the party that will best use the spectrum in the public interest. Yet, under the D.C. Circuit's decision, that condition would be virtually unenforceable.

The court of appeals suggested that the Commission could have "made license grants conditional on periodic checks of financial health, a more extensive credit check, or some other evidence that winning bidders were capable of using their licenses in the public interest." Pet. App. 50a. But the auction process was established to identify the best user of scarce spectrum, not merely one that meets marginal qualifications. If the bidder cannot meet its bid obligation, the

market-based conclusion that it is the best user of the spectrum is fatally undermined. It was, moreover, precisely to avoid the need for subjective inquiries into whether the bidder is more or less qualified than others—with attendant uncertainty and delays—that Congress replaced comparative hearings with the auction mechanism. See H.R. Rep. No. 111, *supra*, at 248; H.R. Rep. No. 19, *supra*, at 16 (comparative hearings "costly, time-consuming, and provide little basis from which to choose licensees"); pp. 2-3, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
*Acting Solicitor General**
LAWRENCE G. WALLACE
Deputy Solicitor General
JEFFREY A. LAMKEN
Assistant to the Solicitor General
WILLIAM KANTER
JACOB M. LEWIS
Attorneys

JOHN A. ROGOVIN
Acting General Counsel
DANIEL M. ARMSTRONG
JOEL MARCUS
Counsel
Federal Communications Commission

MAY 2002

* The Solicitor General is disqualified in this case.

1. 11 U.S.C. 525 provides:

§ 525. Protection against discriminatory treatment

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(b) No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt—

(1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;

(2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

(c)(1) A governmental unit that operates a student grant or loan program and a person engaged in a business that includes the making of loans guaranteed or insured under a student loan program may not deny a grant, loan, loan guarantee, or loan insurance to a person that is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, or another person with whom the debtor or bankrupt has been associated, because the debtor or bankrupt is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of a case under this title or during the pendency of the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(2) In this section, "student loan program" means the program operated under part B, D, or E of title IV of the Higher Education Act of 1965 or a similar program operated under State or local law.

2. 47 U.S.C. 301 provides:

§ 301. License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal

authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States, or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

3. 47 U.S.C. 309 (1994 & Supp. V 1999) provides, in pertinent part:

§ 309. Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the

granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * * *

(j) Use of competitive bidding

(1) General authority

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission—

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that—

(i) are used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum; and

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed—

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall—

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits; and

(F) prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b) and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall—

(A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;

(B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter (other than subsections (d)(2) and (e) of this section);

(C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;

(D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;

(G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology; or

(H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

* * * * *

4. 47 U.S.C. 310 provides, in pertinent part:

§ 310. License ownership restrictions

* * * * *

(d) Assignment and transfer of construction permit or station license

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the pubic interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

Nos. 01-653, 01-657

JUN 21 2002

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORP., *et al.*,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS NEXTWAVE PERSONAL COMMUNICATIONS INC. AND NEXTWAVE POWER PARTNERS INC.

THOMAS G. HUNGAR
DOUGLAS R. COX
MIGUEL A. ESTRADA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

DONALD B. VERRILLI, JR.
Counsel of Record
IAN HEATH GERSHENGORN
WILLIAM M. HOHENGARTEN
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Suite 1200 South
Washington, DC 20005
(202) 639-6000

Counsel for Respondents

[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

G. ERIC BRUNSTAD, JR.
BINGHAM DANA LLP
One State Street
Hartford, CT 06103
(860) 240-2700

DEBORAH L. SCHRIER-RAPE
SCHRIER-RAPE, P.C.
5929 Westgrove Drive
Dallas, TX 75248
(972) 818-6761

FRANK A. CASSOU
MICHAEL WACK
NEXTWAVE TELECOM INC.
601 Thirteenth Street, N.W.
Suite 320 North
Washington, DC 20005
(202) 661-2082

QUESTION PRESENTED

Section 525 of the Bankruptcy Code provides that "a governmental unit may not . . . revoke . . . a license . . . to . . . a person that is . . . a debtor under this title . . . solely because such . . . debtor . . . has not paid a debt that is dischargeable" in bankruptcy. 11 U.S.C. § 525(a). The question raised in the petitions is whether the court of appeals correctly held that the plain language of § 525(a) precluded the Federal Communications Commission from revoking licenses held by a debtor in bankruptcy solely because such debtor had not made installment payments on debts that are dischargeable in bankruptcy.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. are both wholly owned subsidiaries of NextWave Telecom Inc. ("NTI"). No publicly traded company owns 10 percent or more of NTI's stock.

In addition to the Petitioners in Nos. 01-653 and 01-657, several intervenors in the proceeding below are also parties to this proceeding under Rule 12.6. They include the following:

AT&T Wireless Services, Inc. (more than 10 percent of the stock of which is owned by NTT DoCoMo);

BellSouth Corporation;

BellSouth Cellular Corporation;

Cellco Partnership d/b/a Verizon Wireless (which is owned by Verizon Communications Inc. and Videophone Group PLC);

Cellular Telecommunications Industry Association;

Dobson Communications Corporation (more than 10 percent of the stock of which is owned by AT&T Wireless Services, Inc.);

Nextel Communications, Inc. (more than 10 percent of the stock of which is owned by Motorola, Inc., and its subsidiaries);

Sprint Spectrum L.P. d/b/a Sprint PCS (which is wholly owned by Sprint Corporation); and

TeleCorp PCS, Inc. (more than 10 percent of the stock of which is owned by AT&T Wireless Services, Inc.).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 2

A. NextWave's Initial Efforts To Enter The Wireless Market 2

B. Bankruptcy Proceedings 7

C. The Second Circuit's Mandamus Decision 11

D. Judicial Review Of The Attempted Cancellation 12

E. NextWave's Second Plan Of Reorganization 14

SUMMARY OF ARGUMENT 15

ARGUMENT 18

I. THE FCC VIOLATED SECTION 525 18

A. NextWave's Payment Obligations To The FCC Are Dischargeable Debts 20

1. The obligations are "debts" 20

2. The debts are "dischargeable" 21

TABLE OF CONTENTS - continued

Page

3. *Davenport* and *Kovacs* foreclose the FCC's contrary argument.....21

B. The FCC Canceled The Licenses "Solely Because" NextWave Did Not Pay Its Debts To The FCC 24

C. Section 525 Is Not Limited To Discrimination Of The Kind The FCC Posits 28

D. Nothing In The Second Circuit's Decisions Is Inconsistent With Applying § 525 As Written.....29

1. The plain language of the Code establishes that NextWave's debts to the FCC are dischargeable in the bankruptcy court. 29

2. The Second Circuit did not hold that the bankruptcy court lacks the power to discharge NextWave's debts. 30

3. The FCC's misreading of the Second Circuit's decisions does not help it here.....32

II. THE STRUCTURE AND PURPOSES OF THE BANKRUPTCY CODE REINFORCE § 525'S PLAIN MEANING.....34

A. Section 525 Is An Essential Feature Of The Code's Structural Protection Of The Reorganization Process.....34

B. The Code's Structure Defeats The FCC's Attempt To Create A General Regulatory Exception 37

TABLE OF CONTENTS - continued

Page

C. NextWave's Right To Cure Pre-Confirmation Defaults Provides An Independent Basis For Affirmance.....40

III. SECTION 525 DOES NOT CONFLICT WITH THE COMMUNICATIONS ACT.....40

A. Section 525 Does Not Conflict With Any Requirement Of The Communications Act 41

B. Section 525 Does Not Obstruct The FCC's Exercise Of Its Licensing Or Auction Authority 42

1. Applying § 525 as written does not conflict with the FCC's licensing authority.....43

2. Applying § 525 as written does not prevent the FCC from exercising its auction authority 43

CONCLUSION.....50

TABLE OF AUTHORITIES

CASES **PAGE**

Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990).....19

Bank of America v. National Trust & Savings Ass'n 203 N. LaSalle St. Partnership, 526 U.S. 434 (1999).....34, 48

Bieger v. IRS, 496 U.S. 53 (1990).....35

In re Benjamin Coal Co., 978 F.2d 823 (3d Cir. 1992).....33

Board of Governors v. MCorp Financial, Inc., 502 U.S. 32 (1991).....39

Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co., 331 U.S. 519 (1947).....28

B&W Enterprises, Inc. v. Goodman Oil Co., 713 F.2d 534 (9th Cir. 1983).....25

In re Burger Boy, Inc., 183 B.R. 682 (S.D.N.Y. 1994).....32

In re Central Arkansas Broadcasting Co., 68 F.3d 213 (8th Cir. 1995).....18

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).....42

Consumers Produce Co. v. Volante Wholesale Produce, Inc., 16 F.3d 1374 (3d Cir. 1994).....25

Cousins v. Secretary of the United States Department of Transportation, 880 F.2d 603 (1st Cir. 1989).....42

CFTC v. Weintraub, 471 U.S. 343 (1985).....8

FCC v. WOKO, Inc., 329 U.S. 223 (1946).....43

TABLE OF AUTHORITIES – continued

PAGE

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).....19

Franconia Associates v. United States, No. 01-455, 2002 WL 1270248 (U.S. June 10, 2002).....46

In re GWI PCS 1, Inc., 230 F.3d 788 (5th Cir. 2000), *cert. denied*, 533 U.S. 964 (2001).....8, 49

Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000).....18, 26

Hoffman Plastic Compounds, Inc. v. NLRB, 122 S. Ct. 1275 (2002).....42

Institut Pasteur v. Cambridge Biotech Corp., 104 F.3d 489 (1st Cir. 1997).....36

J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc., 122 S. Ct. 593 (2001).....41

In re Jartran, Inc., 732 F.2d 584 (7th Cir. 1984).....46

Johnson v. Home State Bank, 501 U.S. 78 (1991).....20

Kawaauhau v. Geiger, 523 U.S. 57 (1998).....19

Kesler v. Department of Public Safety, 369 U.S. 153 (1962).....27

Kokoszka v. Belford, 417 U.S. 642 (1974).....47

Lopez v. Davis, 531 U.S. 230 (2001).....35

Moody v. Amoco Oil Co., 734 F.2d 1200 (7th Cir. 1984).....35

NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984).....*passim*

Nathanson v. NLRB, 344 U.S. 25 (1952).....8, 32

TABLE OF AUTHORITIES – continued

PAGE

New York v. FERC, 122 S. Ct. 1012 (2002) 27

Official Committee of Equity Security Holders v. Mabey, 832 F.2d 299 (4th Cir. 1987) 6

Ohio v. Kovacs, 469 U.S. 274 (1985) 21, 24, 49

Patterson v. Shumate, 504 U.S. 753 (1992).....37

Pennsylvania Department of Welfare v. Davenport, 495 U.S. 552 (1990).....*passim*

In re Penrod, 169 B.R. 910 (Bankr. N.D. Ind. 1994) *aff'd*, 50 F.3d 459 (7th Cir. 1995) 33

Perez v. Campbell, 402 U.S. 637 (1971) 27, 28, 29

Rake v. Wade, 508 U.S. 464 (1993).....18

Reiter v. Sonotone Corp., 442 U.S. 330 (1979).....28

Reitz v. Mealey, 314 U.S. 33 (1941) 27

Salinas v. United States, 522 U.S. 52 (1997).....21

In re Shannon, 234 B.R. 676 (B.A.P. 6th Cir. 1999) 25

Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942).....43

In re Stewart Foods, Inc., 64 F.3d 141 (4th Cir. 1995).....36

TRW, Inc. v. Andrews, 122 S. Ct. 441 (2001).....21, 26

In re Taddeo, 685 F.2d 24 (2d Cir. 1982).....40

Toibb v. Radloff, 501 U.S. 157 (1991).....18

United Bank v. Wolas, 502 U.S. 151 (1991).....34, 37

United States v. Nordic Village, Inc., 503 U.S. 30 (1992).....28

TABLE OF AUTHORITIES – continued

PAGE

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989).....18, 19

United States v. Whiting Pools, Inc., 462 U.S. 198 (1983).....*passim*

Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001).....28

STATUTES AND REGULATIONS

5 U.S.C. § 706(2).....42, 43

7 U.S.C. § 204 25

7 U.S.C. § 228b 25

7 U.S.C. § 499d(a) 25

7 U.S.C. § 499g(d).....25

11 U.S.C. § 101(5)(A).....18, 20

11 U.S.C. § 101(12).....18, 20

11 U.S.C. § 101(41).....18

11 U.S.C. § 362 .....7, 34

11 U.S.C. § 362(a).....11

11 U.S.C. § 362(a)(4).....34, 35

11 U.S.C. § 362(a)(5).....34, 35

11 U.S.C. § 362(b)(1).....38

11 U.S.C. § 362(b)(4).....38, 39

11 U.S.C. § 362(b)(8).....39

11 U.S.C. § 362(b)(12).....39

TABLE OF AUTHORITIES – continued

PAGE

11 U.S.C. § 362(b)(13) 39
11 U.S.C. § 362(b)(16) 39
11 U.S.C. § 365(b)(1) 35
11 U.S.C. § 506(a) 48
11 U.S.C. § 506(b) 48
11 U.S.C. § 507(a)(8) 49
11 U.S.C. § 507(a)(9) 49
11 U.S.C. § 523 21
11 U.S.C. § 523(a)(1) 21, 39
11 U.S.C. § 523(a)(7) 39
11 U.S.C. § 523(a)(8) 21, 39
11 U.S.C. § 523(a)(12) 21, 39
11 U.S.C. § 523(a)(13) 21, 39
11 U.S.C. § 525(a) ..... *passim*
11 U.S.C. § 542(a) 35
11 U.S.C. § 544 49
11 U.S.C. § 548 49
11 U.S.C. § 1111(b)(2) 49
11 U.S.C. § 1123(a)(5)(G) 11, 40
11 U.S.C. § 1123(b)(2) 35
11 U.S.C. § 1124 ..... 32, 33
11 U.S.C. § 1124(2) 40
11 U.S.C. § 1124(2)(a) 11, 40

TABLE OF AUTHORITIES – continued

PAGE

11 U.S.C. § 1126(f) 33, 40
11 U.S.C. § 1129 33
11 U.S.C. § 1129(a)(8) 48
11 U.S.C. § 1129(b)(2)(A) 48
11 U.S.C. § 1141(d) 32, 33
11 U.S.C. § 1141(d)(1)(A) 15, 18, 21, 30
11 U.S.C. § 1141(d)(2) 21
11 U.S.C. § 1141(d)(3) 21
15 U.S.C. § 636(a) 50
28 U.S.C. § 157 30
28 U.S.C. § 157(b)(2)(I) 30
28 U.S.C. § 157(b)(2)(J) 30
28 U.S.C. § 157(b)(2)(L) 30
28 U.S.C. § 1334 30
28 U.S.C. § 1334(b) 30, 32
28 U.S.C. § 1334(c)(2) 32
28 U.S.C. § 2342 30
47 U.S.C. § 309(j) 3
47 U.S.C. § 309(j)(3)(B) 3, 45
47 U.S.C. § 309(j)(4)(A) 16, 41, 46, 50
47 U.S.C. § 309(j)(4)(B) 49
47 U.S.C. § 309(j)(4)(D) 3, 45
47 U.S.C. § 309(j)(6) 49

TABLE OF AUTHORITIES – continued

PAGE

47 U.S.C. § 402 ..... 12, 30
47 U.S.C. § 402b 42
47 U.S.C. § 402b(5) 43
47 U.S.C. § 402g 42, 43
7 C.F.R. § 46.9(b) 25
47 C.F.R. § 1.2110(g)(4) 20
47 C.F.R. § 24.203 ..... 4, 49

LEGISLATIVE MATERIALS

H.R. 4690 § 618, 106th Cong. (2000) 19
H.R. 2670 § 618, 105th Cong. (1999) 19
S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 35
H.R. Rep. No. 105-801 (1998) 5, 6, 8, 45
H.R. Rep. No. 103-111 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378 ..... 3, 45, 46
H.R. Rep. No. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787 ..... 27, 34, 36, 44
H.R. Rep. No. 84-1196 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3704 25
Omnibus Consolidated Appropriations Act 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996) 5
Hearings Before the Subcomm. on Telecomm. and the Internet of the House Comm. on Energy and Commerce, 107th Cong. (Dec. 11, 2001) 5

TABLE OF AUTHORITIES – continued

PAGE

Joint Hearings Before the Subcomm. on Commercial and Admin. Law and the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 107th Cong. (Dec. 6, 2001) 48
123 Cong. Rec. 216 (daily ed. Jan. 4, 1977) 27

ADMINSTRATIVE RULINGS

In re Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, 15 F.C.C.R. 21520 (2000) 12
In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, 15 F.C.C.R. 16266 (2000) 12
In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, 12 F.C.C.R. 16436 (1997) 6
Applications of Alaska Native Wireless, LLC, No. DA 02-504, 2002 WL 334189 (WTB Mar. 4, 2002) 13
In re Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 8 F.C.C.R. 2348 (1993) 3
In re Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 9 F.C.C.R. 2348 (1994) 45

TABLE OF AUTHORITIES – continued

PAGE

MISCELLANEOUS

3 *Collier on Bankruptcy* (15th ed. rev. 2002) 35

4 *Collier on Bankruptcy* (15th ed. rev. 2002) 32

7 *Collier on Bankruptcy* (15th ed. rev. 2002) 33, 40, 49

Yochi J. Dreazen & Pui-Wing Tam, *Qualcomm to Invest in NextWave, Center of Wireless-Market Dispute*, Wall St. J., Aug. 17, 2001 14

FCC Hits $20 Billion Mark in Total Auction Revenues, 1996 WL 159208 (FCC Apr. 5, 1996).....5

Peter S. Goodman, *Auction Fails to Open Airwaves; Small Firms Backed By Cellular Titans Buy Up Spectrum*, Wash. Post, Jan. 23, 2001 13

TR Daily (May 7, 2002).....15

WCS Auction Ends With Bid Total of Only $13.6 Million, Comm. Daily, Apr. 28, 1997 5

Heather F. Weaver, *FCC Gives Guidance on Installment Payment Changes*, Crain's Radio Comm. Report, Sept. 28, 1998.....6

BRIEF FOR RESPONDENTS

The Bankruptcy Code is essential to the efficient functioning of the Nation's market economy. The Code responds to the problem of insolvency with a comprehensive framework that fosters rehabilitation of insolvent businesses and ensures fair and equal treatment of creditors – thereby ameliorating the serious social costs and market inefficiencies of liquidation.

This case involves an effort by the Federal Communications Commission ("FCC") to exempt itself from a critical Code provision – Section 525 – that protects reorganizing debtors holding government licenses. Section 525 forbids government agencies from revoking licenses solely because a debtor does not pay a debt that is dischargeable in bankruptcy. 11 U.S.C. § 525(a). In this case, the Court of Appeals applied the plain text of § 525 to invalidate the FCC's attempt to revoke the spectrum licenses of NextWave Telecom Inc. and its affiliates ("NextWave") solely because NextWave deferred debt payments to the FCC while reorganizing.

The facts of this case vividly confirm the importance of § 525. In 1996 and 1997, NextWave participated in auctions for spectrum set aside by the FCC for businesses with limited assets and capital, and entered into a long-term installment payment agreement with the FCC to pay for the licenses. As a result of a marketwide collapse in spectrum prices, NextWave was forced to file for bankruptcy protection in June 1998. NextWave followed all applicable bankruptcy rules and procedures in order to reorganize and maximize value for its creditors. The FCC actively participated in the bankruptcy process, aggressively protecting its interests as a secured creditor. In December 1999, 18 months after filing for bankruptcy, NextWave proposed a plan of reorganization that provided for full payment to the FCC and all other creditors, which would have quickly put the licenses to their intended use. Rather than continue to play

by the bankruptcy rules, the FCC chose the critical moment when NextWave was set to emerge from Chapter 11 to assert for the first time that, for "regulatory" reasons, it was revoking NextWave's licenses because NextWave had not made an installment payment on those licenses some fifteen months earlier. The FCC then reauctioned the licenses (at the peak of a spike in spectrum values) to the large incumbents that already dominate the wireless industry. That action derailed NextWave's reorganization, delayed deployment of the licenses to serve the public, and threatened to destroy $600 million of investment by NextWave's other creditors and equity holders.

As the D.C. Circuit correctly held, the FCC's conduct was an obvious violation of § 525. The provision makes irrelevant the government's motive in canceling a license; cancellations are prohibited whether the government is acting for regulatory or pecuniary purposes or some mixture of the two. Neither the FCC nor any other agency has the power to claim for itself a regulatory exception to the Code that overrides the statute's plain language and the policies that it embodies. Congress has taken care to grant government entities specific exemptions from the Code where warranted, and this Court has scrupulously respected those judgments by refusing to create additional exceptions at the behest of regulators who – like the FCC here – claim the Code interferes with their regulatory agendas. Section 525 should thus be enforced as written.

STATEMENT OF THE CASE

A. NextWave's Initial Efforts To Enter The Wireless Market

NextWave was formed in 1995 by experienced telecommunications executives to compete as a nationwide "carrier's carrier," providing wireless services on a wholesale basis. By early 1996, NextWave had raised more than $600 million – from institutional investors such as banks, insurance com-

panies and pension funds, and telecommunications companies – and had retained Merrill Lynch and Lehman Brothers to lead its public financing efforts. Joint Appendix ("JA") 39.

In May and July 1996, NextWave participated in the FCC's "C-Block" auction of electromagnetic spectrum licenses for personal communications services ("PCS"). Congress had previously authorized the FCC to distribute spectrum licenses by competitive bidding, 47 U.S.C. § 309(j), but was concerned that a strict auction regime would favor large companies and intensify concentration in the industry, *see id.* § 309(j)(3)(B); H.R. Rep. No. 103-111, at 255-56 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 581-82. Congress thus instructed the FCC to ensure that "small businesses" have the opportunity to obtain spectrum licenses via auction. 47 U.S.C. § 309(j)(4)(D). The FCC reserved the C-Block spectrum (and "F-Block" spectrum) for "designated entities," generally small businesses and entrepreneurs with assets and gross revenues below certain thresholds. Pet. App. 53a.

Though not required by statute to do so, the FCC "extended credit" to bidders in the C- and F-Block auctions by allowing them to pay for licenses in installments. *In re Implementation of Section 309(j) of the Communications Act Competitive Bidding*, 8 F.C.C.R. 7635, ¶ 69 (1993). The FCC noted that installment payments "would reduce the amount of private financing needed by a prospective licensee," but would also "burden . . . the government with the risk of default." *Id.* The FCC thus limited installment plans to bidders, like those in the C-Block auction, "whose economic opportunity should be ensured and [who] are likely to have difficulty obtaining adequate private financing." *Id.*

Successful C-Block bidders were required to pay five percent of their bid at the close of the auction, an additional five percent at the time of the license grant, and the remaining 90 percent in installments over ten years, with no principal due for the first six years. *See* Pet. App. 53a–54a

n.4. Moreover, under the FCC's rules, licensees such as NextWave had to construct specified portions of their networks within five years after receiving their licenses; the FCC chose not to impose any intermediate deadlines during that five-year period. 47 C.F.R. § 24.203.

NextWave was the high bidder at the C-Block auctions for 63 licenses with bids totaling $4.74 billion – an amount consistent with spectrum values implied by contemporaneous valuations of comparable publicly traded wireless companies. JA39. NextWave made the requisite $237 million down payment and filed applications for the licenses. Pet. App. 312a-313a. The FCC did not issue the licenses until January 1997, whereupon NextWave paid the remainder of its down payment, bringing its total payment to almost $500 million. As required by the FCC, NextWave signed promissory notes for the balance of its debt and executed security agreements giving the FCC liens on the licenses. *Id.* at 391a, 401a. The FCC then filed statements under the Uniform Commercial Code to perfect its liens. *Id.* at 5a.[1]

NextWave moved quickly to implement its business plan. By early 1997, NextWave had hired more than 600 employees and contractors and opened 22 offices across the country. JA39-40. NextWave had also secured more than $2 billion in financing commitments for network equipment from vendors such as Lucent, Hughes, and Nortel. JA40-41. Within a few months, NextWave had set up ninety percent of the microwave links needed to launch service, acquired seven switch sites, designed more than 1300 cell sites, and signed more than 300 site leases. JA40. NextWave expected to begin service in four markets (including Washington,

[1] In a subsequent auction of D-, E-, and F-Block licenses, NextWave was the high bidder for 32 additional licenses with bids totaling $125 million. NextWave made timely down payments on its 27 F-Block licenses, which are also at issue in this appeal. NextWave paid in full for its 5 D-Block and E-Block licenses when granted and those licenses are not at issue.

D.C.) by late 1997, and had completed engineering designs for 22 major markets. JA40. NextWave had also signed contracts to sell more than 35 billion minutes of use to resellers such as MCI. JA40-41.

NextWave and all other C-Block licensees suffered a dramatic reversal as 1997 unfolded. To begin with, the FCC "failed to complete action on all license applications" until long after the auction was over, forestalling C-Block licensees from raising funds in capital markets. H.R. Rep. No. 105-801, at 15 (1998). During that period of delay, the FCC auctioned nearly 1500 additional PCS licenses in the D, E, and F Blocks. Bids for those licenses averaged less than 25 percent of the C-Block bids.[2] Virtually overnight, the capital markets dried up, and the vast majority of C-Block licensees could not secure financing to build out their networks and make installment payments to the FCC.[3]

[2] Although the Commission had announced in August 1995 that there would be auctions of D, E, and F Blocks at some time after the C-Block auction, the subsequent auction dates were not announced until the initial C-Block auction was well underway. *See FCC Hits $20 Billion Mark in Total Auction Revenues*, 1996 WL 159208 (FCC Apr. 5, 1996); *cf.* FCC Br. 7 n.5. The PCS band was not the only spectrum market where prices declined. In the "WCS auction," *see* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996), an auction that Congress had earmarked for $1.8 *billion* garnered slightly more than $13 *million*. *See WCS Auction Ends With Bid Total of Only $13.6 Million*, Comm. Daily, Apr. 28, 1997. These depressed market conditions prevailed through mid-1999: in a PCS spectrum auction that concluded in April 1999, bids averaged less than 12 percent of the initial C-Block prices. *See generally Hearing Before the Subcomm. on Telecomm. and the Internet of the House Comm. on Energy and Commerce*, 107th Cong. at 24 (Dec. 11, 2001) ("*Commerce Hearing*") (statement of Rep. Tauzin).

[3] *See Commerce Hearing* at 24 (statement of Rep. Tauzin) ("the speed in which Congress and the FCC went out and auctioned additional spectrum . . . may have severely undercut capacity of groups like NextWave to go out and do their financing"). As the district judge who presided over NextWave's bankruptcy proceeding observed, "[a]pproximately $1.6 billion of public financing was sought by C block licensees after the

In response to this industry-wide crisis, the FCC initiated proceedings to consider possible relief. In March 1997, shortly after the second-largest C-Block licensee – Pocket Communications Inc. ("Pocket") – filed for bankruptcy, the FCC temporarily suspended the payment obligations of C- and F-Block licensees. That step "effectively signal[ed] to capital markets that the C-block was financially imperiled," further hampering licensees' ability to raise capital. H.R. Rep. No. 105-801, at 16. In October 1997 and March 1998, the FCC issued orders offering limited restructuring options to those licensees (the "*Restructuring Orders*"). *See* Pet. App. 5a-6a (describing orders). As then-Chairman Hundt observed in dissent, however, the FCC failed to "adopt a comprehensive plan for addressing the financial situation of the C-Block," leaving "a substantial risk of bankruptcies that Congress and any commercially reasonable enterprise would have us eliminate."[4]

By October 1997, the third-largest C-Block license holder – General Wireless, Inc. ("GWI") – had joined Pocket in bankruptcy.[5] NextWave did not, however, seek bankruptcy protection at that time. Between November 1997 and June 1998, NextWave's officers and shareholders lent the company millions of dollars while it continued to construct its network and seek permanent financing to meet its obligations to the FCC. JA43. Despite its efforts to remain solvent,

award of their licenses. Not one dollar of this $1.6 billion was raised in the public market." Pet. App. 270a.

[4] Separate Statement of Chairman Reed E. Hundt, *In re Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Communications Servs. (PCS) Licensees*, 12 F.C.C.R. 16436 (1997).

[5] Eventually, 92 percent of the approximately 90 C-Block licensees would declare bankruptcy, fail entirely, or return their licenses to the FCC. *See* Heather F. Weaver, *FCC Gives Guidance on Installment Payment Changes*, Crain's Radio Comm. Report, Sept. 28, 1998, at 22; *see also* Pet. App. 270a ("[T]he C Block auction was a disaster for every participant. Those who bid but did not win are lucky, not hurt") (district court decision).

NextWave was forced to curtail its operations, laying off more than 500 employees and contractors. By June 1998, NextWave owed more than $400 million to creditors (in addition to its FCC obligations) and faced attachment proceedings and other debt collection litigation.

B. Bankruptcy Proceedings

NextWave's Bankruptcy Filing. On June 8, 1998 – after spending well over half a billion dollars to meet its FCC obligations and to build its network – NextWave filed a Chapter 11 bankruptcy petition. NextWave was not in default on any of its obligations to the FCC. NextWave sought the protections of Chapter 11 for the reasons all debtors do – to preserve the value of the estate for all creditors, and to obtain breathing space to reorganize and emerge as a viable entity. Pursuant to the Bankruptcy Code's general prohibition against payment of prepetition debts while in bankruptcy, *see, e.g., Official Comm. of Equity Sec. Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir. 1987), NextWave suspended payments to all creditors, including the FCC, until confirmation of a plan of reorganization.

Initially, NextWave's bankruptcy proceeded routinely. Creditors, including the FCC, filed their proofs of claim. The FCC asserted secured claims of more than $4.7 billion. JA34. In a July 1998 bankruptcy court filing, the FCC acknowledged that the Code's protections suspended otherwise applicable regulatory deadlines. C.A. App. 737 (citing 11 U.S.C. § 108(b)(2)).[6] That same filing confirmed that the Code's automatic stay (11 U.S.C. § 362) would give NextWave "'bankruptcy protection from collection of C block license payments pending reorganization of its business affairs.'" Pet. App. 181a (citation omitted). The FCC's statements in court thus recognized that NextWave could

[6] "C.A. App." refers to the Joint Appendix filed in the D.C. Circuit. Copies of the C.A. App. have been lodged with the Court.

retain its licenses, even though it was not making installment payments while it reorganized.[7]

Section 544 Proceedings. As a debtor-in-possession, NextWave had a fiduciary duty to *all* of its creditors and was obligated to limit its payments to each creditor to the amount required by law. *CFTC v. Weintraub*, 471 U.S. 343, 355 (1985); *Nathanson v. NLRB*, 344 U.S. 25, 28-29 (1952). Before NextWave had filed for bankruptcy, the court in GWI's bankruptcy case had significantly reduced GWI's obligations to the FCC in an avoidance action under the Code. *See In re GWI PCS 1, Inc.*, 230 F.3d 788, 794 (5th Cir. 2000), *cert. denied*, 533 U.S. 964 (2001). NextWave was therefore required to seek similar relief on behalf of its other creditors, which it did under § 544 of the Code. Pet. App. 137a. The bankruptcy court granted relief, *id.* at 138a-141a, and the district court affirmed, *id.* at 254a-272a.

The Second Circuit reversed. *Id.* at 213a-253a. That ruling did not hold, as the FCC implies, that the Bankruptcy Code imposes no substantive limits on the FCC's regulatory authority. *See* FCC Br. 9. As the Second Circuit explained, "[t]he FCC argued that the bankruptcy court lacked *subject matter jurisdiction* over NextWave's claim because exclusive jurisdiction to review FCC regulatory actions is lodged in the courts of appeals." Pet. App. 105a (emphasis added). The Second Circuit agreed that the status of NextWave's license conditions implicated the FCC's regulatory authority. It therefore held that "because jurisdiction over claims

---

[7] Consistent with these statements, prior to October 1998 the Commission sent repeated notices to non-bankrupt C-Block licensees reminding those licensees of their payment obligations and specifying their payment amounts, but no such notices were sent to any licensees in bankruptcy, including NextWave. C.A. App. 925, ¶¶ 5-6. The FCC's actions were also consistent with its position in other C-Block bankruptcy cases. *See* H.R. Rep. No. 105-801, at 16 (FCC "intervened in the bankruptcy proceedings for Pocket Communications, and offered to reduce Pocket's debt obligations by approximately 60 percent").

brought against the FCC in its regulatory capacity lies exclusively in the federal court of appeals, *see* 28 U.S.C. § 2342; 47 U.S.C. § 402," the bankruptcy court lacked jurisdiction "to decide the question whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the licenses." *Id.* at 233a. The Second Circuit then addressed the merits of NextWave's avoidance claim insofar as it concerned financial obligations rather than license disposition. *Id.* at 237a-252a. The court held that a bidder's financial obligations become binding at the close of the auction, foreclosing any avoidance action to reduce the FCC's claim. *Id.* at 240a-247a.

NextWave's Rapid Reorganization. Aided by improving market conditions, NextWave proposed a plan of reorganization in December 1999 that committed the company to meeting all future FCC obligations and paying all creditors, including the FCC, all past-due amounts, penalties, and interest, thus curing all alleged defaults. On January 11, 2000, NextWave also offered the FCC "a single lump sum payment to satisfy its entire $4.3 billion outstanding obligation to the [FCC]," *id.* at 12a, providing full payment for the licenses seven years earlier than required by the original installment notes. Thus, within 18 months of seeking the breathing space provided by the Code, NextWave was poised to emerge from bankruptcy with a plan of reorganization that would have allowed it to build its network and begin service to the public well in advance of the deadlines imposed by FCC rules, thereby vindicating the policies of Chapter 11 *and* the FCC's asserted regulatory interests.

The FCC's Effort to Revoke NextWave's Licenses. Despite having acknowledged repeatedly that NextWave would enjoy the protections of the Bankruptcy Code while reorganizing, on January 12, 2000 – a mere eight days before NextWave's proposed reorganization plan was scheduled to be confirmed – the FCC rejected NextWave's payment offer and blocked confirmation of NextWave's plan. The FCC

contended for the first time ever that NextWave's C- and F-Block licenses had "automatically" canceled more than a year earlier when NextWave did not make installment payments during its bankruptcy. JA52-53. The FCC also announced that NextWave's licenses were "available for auction under the automatic cancellation provisions" of the FCC's rules. Pet. App. 96a-97a. Thus, having taken full advantage of the bankruptcy process as a secured creditor for 18 months while spectrum prices were low, the FCC tried to opt out of the process when market conditions improved.

NextWave sought emergency relief in the bankruptcy court. The court described the FCC's sudden effort to cancel NextWave's licenses as "shocking," *id.* at 135a, and contrary to "countless written and oral utterances and acts of the FCC" throughout the bankruptcy proceedings. *Id.* The court noted, for example, that the FCC had made no effort to cancel the licenses when NextWave did not tender a payment in October 1998. To the contrary, in November 1998, the FCC had acknowledged to the district court that "'[d]uring the pendency of the bankruptcy, the Bankruptcy Court and the automatic stay would hold the creditors at bay, *including the Federal Communications Commission*.'" *Id.* at 182a & n.15 (emphasis added). In a hearing days later, the FCC had confirmed to the bankruptcy court that although "'[t]he regulations provide that upon failure to make the payments the license is automatically canceled[,] . . . *[t]hat hasn't [happened] in this case due to the automatic stay*.'" *Id.* at 182a & n.16. Similarly, in a May 1999 hearing, FCC counsel had emphasized that "'there is no trigger for the automatic cancellation that I understand to date with regard to the F-block licenses,'" which were subject to the same payment conditions as the C-Block licenses. *Id.* at 182a-183a & n.17. Finally, in August 1999, the FCC had negotiated and pledged to support an alternative plan of reorganization to be filed by Nextel, a competitor of NextWave, that provided that the "'licenses . . . issued by the FCC to the NextWave

Debtors . . . would be transferred directly to Nextel'" – a transfer that would not have been possible had the licenses canceled "*automatically*" in October 1998 – and that would have discharged NextWave's debts to the FCC and other creditors by distributing the proceeds of the Nextel payment upon confirmation of the plan. *Id.* at 183a. *See generally id.* at 181a-185a (cataloguing FCC statements throughout bankruptcy proceedings).

After reviewing that history, the bankruptcy court held that the license revocation was irreconcilable with the FCC's prior representations and void under numerous provisions of the Bankruptcy Code, including the automatic stay (11 U.S.C. § 362(a)) and the right to cure (11 U.S.C. §§ 1123(a)(5)(G) and 1124(2)(A)). *Id.* at 134a-212a.

C. The Second Circuit's Mandamus Decision

The FCC sought emergency relief from the Second Circuit, which issued a writ of mandamus on May 25, 2000 vacating the bankruptcy court's order. *Id.* at 102a-133a. The Second Circuit explained, as it had in the earlier appeal, that "the FCC's licensing decisions are subject to the exclusive jurisdiction of the federal courts of appeals." *Id.* at 103a.

The Second Circuit emphasized, however, that NextWave would be "free to pursue its challenge to the FCC's regulatory acts" before the D.C. Circuit. *Id.* at 131a. The court repeatedly declined to rule on the validity of the license cancellation, stating "we have no occasion to express an opinion" whether "the bankruptcy court is right on the merits of its arguments against revocation." *Id.* at 127a; *see also id.* at 103a ("[w]e make no comment on the prospects of the (precautionary) appeals filed by NextWave in . . . the District of Columbia Circuit"); *id.* at 126a n.8 ("we have no occasion to opine on whether the Public Notice [announcing the license cancellation] is valid or whether the Licenses automatically canceled at some prior date").

D. Judicial Review Of The Attempted Cancellation

NextWave had previously filed with the FCC a petition for reconsideration of the license cancellation, shortly after the cancellation had been announced. The FCC denied the petition on September 6, 2000, relying on the Second Circuit's mandamus decision. *Id.* at 83a.

NextWave appealed to the D.C. Circuit pursuant to 47 U.S.C. § 402, asserting that the cancellation was arbitrary and capricious and contrary to law in violation of the Administrative Procedure Act ("APA") and the Bankruptcy Code. Despite NextWave's appeal, and despite NextWave's warnings that a reauction in advance of the D.C. Circuit's decision could cause chaos, the FCC pushed ahead with plans to reauction NextWave's licenses. The FCC warned bidders, however, that the reauction was subject to the NextWave litigation.

The reauction occurred in January 2001, at the peak of a rise in spectrum prices. Moreover, the FCC changed the auction rules to allow telecommunications giants to bid on the licenses (including NextWave's) previously reserved for designated entities. The FCC removed all designated entity restrictions for most of the spectrum, and adopted "more flexible" qualification standards for designated entities entitled to bid on the remaining spectrum.[8]

---

[8] *In re Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Comms. Serv. (PCS) Licensees*, 15 F.C.C.R. 16266, ¶¶ 16-24 (2000); *In re Amendment of Part 1 of the Comm'n's Rules – Competitive Bidding Procedures*, 15 F.C.C.R. 21520, ¶ 59 (2000). These changes drew vigorous protests from Members of Congress. *See, e.g.*, Letter from Sen. Trent Lott to William E. Kennard, Feb. 22, 2000 (objecting to requests from "some of the largest wireless players . . . to tear away entirely meaningful protections for small businesses" in C-Block reauction); Letter from Rep. Tom Bliley and Rep. John Dingell to William E. Kennard (Sept. 26, 2000) (FCC's "legal theory that these small business licenses have automatically cancelled and the agency's subsequent decision that they should be re-

The major wireless incumbents dominated the reauction. Verizon Wireless alone garnered $8.5 billion worth of licenses. Petitioner VoiceStream was the high bidder for hundreds of millions of dollars' worth of licenses, both in its own right and indirectly through a designated entity in which it is the majority investor. Arctic Slope Br. 15-16. Alaska Native Wireless (in which AT&T Wireless holds an 80 percent equity interest and in which petitioner Arctic Slope has a "substantial interest," *id.* at 15 & n.3) was high bidder for $2.7 billion worth of licenses. *See Applications of Alaska Native Wireless, LLC*, 2002 WL 334189 (WTB Mar. 4, 2002). All told, the nation's five largest wireless carriers were (directly or indirectly) the high bidders on 85 percent of the reauctioned spectrum. *See* Peter S. Goodman, *Auction Fails to Open Airwaves; Small Firms Backed By Cellular Titans Buy Up Spectrum*, Wash. Post, Jan. 23, 2001, at A1.

The licenses were never transferred, however, because shortly after the reauction, the D.C. Circuit reversed the cancellation of NextWave's licenses. Pet. App. 1a-51a. The court rejected the FCC's contention that the Second Circuit decisions were *res judicata* on the merits. The D.C. Circuit held that the Second Circuit had held only that the FCC's "license cancellation" was "reviewable only by a court of appeals . . . and thus that the bankruptcy court lacked jurisdiction to apply the Code to these acts." *Id.* at 24a.

The D.C. Circuit then held that the cancellation violated § 525 because a license cancellation triggered solely by a debtor's failure to make a payment while in bankruptcy falls squarely within the unambiguous terms of § 525. *Id.* at 2a. The court rejected each of the FCC's efforts to evade § 525, recognizing them as improper attempts to import a regulatory-purpose exception into the provision. *Id.* at 30a-32a, 41a-43a. The court concluded that, by looking at "no other

---

auctioned to small and large providers alike" is "impossible to square" with § 309(j)'s directive to avoid "excessive concentration of licenses").

factor [than non-payment] in determining whether NextWave should retain its licenses," *id.* at 45a, the FCC violated § 525's prohibition of an "automatic reaction" against a debtor who "avail[s] himself of the protection of the bankruptcy laws," *id.* at 46a (quoting H.R. Rep. No. 95-595, at 165 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6126).

The D.C. Circuit also rejected the argument that application of § 525 would frustrate the Communications Act. The court noted that "nothing in the Act required the Commission to choose the licensing scheme at issue here," *id.* at 50a, and thus that "[t]he Commission, having chosen to create standard debt obligations as part of its licensing scheme, is bound by the usual rules governing the treatment of such obligations in bankruptcy." *Id.* at 2a.[9]

E. NextWave's Second Plan Of Reorganization

After the D.C. Circuit's decision, NextWave resumed its efforts to emerge from bankruptcy. On August 6, 2001, NextWave filed a second proposed plan of reorganization, again providing for full payment to the FCC and all other creditors. NextWave also secured financing commitments of approximately $5 billion and entered into a $100 million hardware contract with Lucent Technologies to continue deploying its advanced wireless network. *See* Yochi J. Dreazen & Pui-Wing Tam, *Qualcomm to Invest in NextWave, Center of Wireless-Market Dispute*, Wall St. J., Aug. 17, 2001, at B3. NextWave has made rapid progress on the construction of its network and has now deployed wireless facilities in all of its C-Block markets.

In the meantime, spectrum prices have remained volatile: the value of NextWave's licenses is perceived by analysts to have fallen by as much as 50-70 percent below the reauction

---

[9] Given its resolution of NextWave's claims under § 525, the D.C. Circuit did not address NextWave's alternative grounds for relief, including the right to cure under §§ 1123 and 1124 of the Code, as well as principles of due process, fair notice, and estoppel. *Id.* at 51a.

bids. *See, e.g.*, TR Daily (May 7, 2002). Indeed, some "winners" of the reauction have contended that they cannot be compelled to pay the amount they bid, notwithstanding the FCC's position that the reauction still binds the high bidders should the FCC ultimately prevail in this case. Respondent Verizon Wireless has filed litigation to rescind the reauction results, and Petitioner VoiceStream has intervened. Notwithstanding the continued volatility in spectrum value, NextWave is committed to paying its full bid, emerging from bankruptcy, and competing in the wireless market.

SUMMARY OF ARGUMENT

Section 525 of the Bankruptcy Code provides that a governmental entity may not "revoke . . . a license . . . to . . . a person that is . . . a debtor under this title . . . solely because such . . . debtor . . . has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. § 525(a). The FCC violated the clear command of that provision when it revoked NextWave's spectrum licenses.

The plain language of the Bankruptcy Code leaves no doubt that the FCC's conduct violated § 525. NextWave's payment obligations to the FCC are clearly "debts." Under the Code, a debt is a liability on a claim, and a claim is any right to payment. "The plain meaning of a 'right to payment' is nothing more than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation." *Pennsylvania Dep't of Welfare v. Davenport*, 495 U.S. 552, 559 (1990). It is equally clear that NextWave's debts are dischargeable. In Chapter 11 cases, by operation of law, a plan of reorganization discharges "any debt that arose before the date of such confirmation." 11 U.S.C. § 1141(d)(1)(A). And the FCC canceled NextWave's licenses "solely because" NextWave did not pay its debts to the FCC while reorganizing: the sole trigger for cancellation was nonpayment.

Section 525 is a critically important feature of the Bankruptcy Code. It reflects Congress's judgment that a debtor's licenses are often indispensable to its ability to reorganize. Preserving the debtor's ability to retain its licenses therefore advances the Code's goals of rehabilitating debtors, preventing dismemberment of the debtor's assets and maximizing the value of the estate for creditors, and ensuring that all creditors are treated fairly. NextWave's experience underscores § 525's importance. The FCC's refusal to comply with § 525 not only threatened to defeat the claims of all other creditors, but also derailed a reorganization that would have paid the FCC and NextWave's other creditors in full, allowing NextWave to emerge as a viable competitor within eighteen months of entering Chapter 11.

The FCC's only answer to the plain text of § 525 is to spend page after page restating, in many guises, the single point that § 525 should not apply because NextWave's licenses were revoked for regulatory rather than pecuniary reasons. But § 525 contains no regulatory exception for the FCC, express or implied, and creating one would be fundamentally at odds with § 525 and the Code generally. Congress has taken great care to specify when a particular regulatory interest is important enough to override the Code's protections for debtors and other creditors. Section 525 itself contains an express exception for the Secretary of Agriculture's regulatory actions under three particular enactments, making clear both that § 525 otherwise applies to "regulatory" license revocations and that Congress did not intend an exemption for the FCC.

Nor can the FCC's desired "regulatory exception" be justified as necessary to accommodate a purported conflict with provisions of the Communications Act. There simply is no conflict. When Congress directed the FCC to "consider" using "guaranteed installment payments" or other methods to assist small businesses in bidding for spectrum licenses, 47 U.S.C. § 309(j)(4)(A), it did not mandate any particular

method of financing, nor did it grant the FCC any exemption from the normal operation of the Bankruptcy Code, despite the obvious risk of bankruptcy created by installment loans. And Congress has repeatedly rebuffed efforts by the FCC to obtain a legislative exemption from the Code for its auction-related activities. The FCC lacks the authority to override those judgments in the name of "auction integrity" or any other policy goal. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

The FCC's contention that applying § 525 as written will create incentives for insincere bidding ignores commercial reality and fundamental principles of bankruptcy law. Even apart from the grave business consequences that attend filing for bankruptcy, FCC licensees would have nothing to gain (and much more to lose) from submitting reckless bids with the intent of declaring bankruptcy if the bids cannot be financed. The Code prevents windfalls to licensees: if the debtor's plan of reorganization does not provide for payment of the full amount of the FCC's claim, *the licensee's equity holders risk losing their stake in the company*.

NextWave followed the law when it sought the protections of Chapter 11 and proposed a plan for successful reorganization, and the FCC violated the law when it ignored those protections. The Court of Appeals correctly rejected the FCC's attempt to exempt itself from the same bankruptcy rules that apply to all other creditors. Those rules protect the FCC's financial claims, and do not impair its ability to implement the Communications Act. This Court should affirm the D.C. Circuit's application of § 525 as written, lest other governmental units also seek to exempt themselves from the Code's clear terms, thus undermining the purposes and policies the Code promotes and upholds.

ARGUMENT

I. THE FCC VIOLATED SECTION 525.

Section 525 provides in plain terms that "a governmental unit may not deny, revoke, suspend or refuse to renew a license, permit, charter, franchise or other similar grant to . . . a person that is . . . a debtor under this title . . . solely because such . . . debtor . . . has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. § 525(a).

Section 525 undoubtedly applies here. It is undisputed that the FCC is a "governmental unit" that "revoked" a "license" to a "person that is a debtor under this title."[10] The FCC's own statements unambiguously demonstrate that its sole basis for canceling the licenses was NextWave's failure to make installment payments in October 1998. FCC Br. 9-10. Those payment obligations are clearly "debts." 11 U.S.C. § 101(12) ("debt" is "liability on a claim"); *id.* § 101(5)(A) ("claim" is "right to payment"). Like any other pre-confirmation debt, NextWave's payment obligations are dischargeable in NextWave's case under Title 11 by confirmation of a plan of reorganization. *Id.* § 1141(d)(1)(A).[11]

Because the "statutory language is clear," *Rake v. Wade*, 508 U.S. 464, 471 (1993), the D.C. Circuit correctly "enforce[d] it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *accord Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). The FCC nevertheless maintains that § 525 is an

---

[10] Under the Code, "person" includes a "corporation" as well as an individual. 11 U.S.C. § 101(41); *see Toibb v. Radloff*, 501 U.S. 157 (1991).

[11] Section 525 precludes cancellation whether or not the licenses fall within the Code's broad definition of "property of the estate." 11 U.S.C. § 541(a). Nevertheless, NextWave's interest in the licenses – the exclusive right to use particular spectrum for a defined period – constitutes "property of the estate." *E.g., In re Central Ark. Broad. Co.*, 68 F.3d 213, 214-15 (8th Cir. 1995); *see also United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05 (1983) (noting Code's broad definition of "property of the estate").

"ambiguous statute" that ought to be given an "accommodative meaning" to allow the FCC to revoke licenses as it sees fit. FCC Br. 21. Specifically, the FCC contends that (i) NextWave's payment obligations to the FCC are not "dischargeable debts," but "regulatory conditions"; (ii) the licenses were not revoked "solely because" NextWave missed payments, but for "regulatory purposes"; (iii) § 525 should be limited to actions that specifically discriminate against debtors; and (iv) the Second Circuit's rulings in NextWave's bankruptcy case establish that the debts are not dischargeable "in the case under this title." *Id.*

The FCC's arguments merely seek in four different ways a judicially created "regulatory" exception to § 525. The FCC's arguments, however, are contrary to any "natural reading" of § 525's terms, the relevant "terminology used throughout the Code," and the Code's structure and purposes. *Ron Pair Enters.*, 489 U.S. at 241, 242 n.5. Moreover, the FCC's reading of the Bankruptcy Code is entitled to no deference. *See Bildisco*, 465 U.S. at 529 n.9; *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). Thus, even if the FCC's policy preferences had merit – and they do not (*see* pp. 41-50 *infra*) – they must be addressed to Congress. "[U]nless and until Congress makes such a decision," this Court "must follow the current direction [§ 525] provides." *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998).[12]

---

[12] Legislation has repeatedly been introduced in Congress to exempt the FCC's licensing decisions from "Title 11, United States Code, or any otherwise applicable Federal or state law regarding insolvencies or receiverships," *see, e.g.*, H.R. 4690 § 618, 106th Cong. (2000); H.R. 2670 § 618, 105th Cong. (1999), but that legislation has never been enacted. Congress's repeated consideration and rejection of an exemption for the FCC's licensing decisions confirms that the FCC's efforts to obtain the same relief from this Court must fail. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147-50 (2000).

A. NextWave's Payment Obligations To The FCC Are Dischargeable Debts.

1. ***The obligations are "debts."*** NextWave's obligations to make installment payments to the FCC are plainly "debts" under the Bankruptcy Code. The term "debt" is an expressly defined term used throughout the Code and cannot be redefined *ad hoc* just for this case. "Debt" means "liability on a claim." 11 U.S.C. § 101(12). "Claim," in turn, has "the broadest available definition," *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991), and includes any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). A "right to payment" means "nothing more or less than an enforceable obligation." *Johnson*, 501 U.S. at 83 (quotation and citation omitted).

NextWave's payment obligations to the FCC unquestionably fall within the definition of "debt." Their source is an "Installment Payment Plan Note," which creates an enforceable obligation on NextWave's part to make installment payments to the FCC. Pet. App. 391a-393a. NextWave also executed a security agreement defining NextWave as a "Debtor" under the Note, *id.* at 401a, and the FCC recorded the liens by filing UCC statements, *id.* at 5a. The licenses themselves similarly require NextWave to comply with "the terms of the Commission's installment plan as set forth in the Note and Security Agreement." *Id.* at 388a. Although the licenses are conditioned upon "payment of all monies due pursuant to Sections 1.2110 and 24.711 of the Commission's Rules," *id.*, those rules merely restate the requirement of "performance of the licensee's *payment obligations under the installment plan*" – *i.e.*, the Note. 47 C.F.R. § 1.2110(g)(4) (emphasis added). Finally, in NextWave's bankruptcy case, the FCC asserted a "secured claim" of $4.7 billion dollars. JA 34. Because the FCC holds a "claim," NextWave owes a "debt."

2. ***The debts are "dischargeable."*** NextWave's debts to the FCC are also plainly "dischargeable." An obligation's status as a pre-confirmation "debt" conclusively establishes its dischargeability, unless it falls within an express exception to discharge. *See Ohio v. Kovacs*, 469 U.S. 274, 278 (1985). Section 1141 is absolutely clear: it provides that "the confirmation of a plan [of reorganization] . . . discharges the debtor from *any debt* that arose *before the date of such confirmation*," except where express statutory exceptions to discharge apply. 11 U.S.C. § 1141(d)(1)(A) (emphasis added).

No statutory exception to discharge applies here. The Code expressly excepts certain debts of individual debtors from discharge, *id.* §§ 523, 1141(d)(2), and excepts debts of *liquidating* corporations, *id.* § 1141(d)(3), but there are *no* exceptions for reorganizing corporate debtors like NextWave. The Code's unambiguous text leaves no room for the implied regulatory exception the FCC seeks. Congress's use of "the word 'any'" in § 1141(d) to define the scope of discharge "undercuts the attempt to impose [a] narrowing construction." *Salinas v. United States*, 522 U.S. 52, 57 (1997). And the existence of specific exceptions from discharge for particular regulatory purposes, *see* 11 U.S.C. § 523(a)(1), (a)(8), (a)(12), (a)(13), refutes any argument for a general regulatory exception. *See TRW, Inc. v. Andrews*, 122 S. Ct. 441, 447 (2001).

3. **Davenport *and* Kovacs *foreclose the FCC's contrary argument.*** Notwithstanding the Code's definition of "debt" and the scope of the discharge under Chapter 11, the FCC baldly asserts that NextWave's obligations are not dischargeable debts because "the payment obligations in the FCC licenses are regulatory conditions." FCC Br. 30. In addition to conflicting with the plain statutory language, that argument is squarely foreclosed by this Court's decisions in *Davenport* and *Kovacs* – which Petitioners ignore.

The issue in *Davenport* was whether "restitution obligations imposed as conditions of probation in state criminal

actions" are dischargeable debts. 495 U.S. at 555. Like the FCC here, the State in *Davenport* contended that the "restitution order is not a 'right to payment' [and therefore not a debt] because neither the Probation department nor the victim stands in a traditional creditor-debtor relationship." *Id.* at 558. The State also argued that criminal restitution obligations are not "debts" or "claims" because their *purpose* is rehabilitation and punishment rather than compensation. *Id.* The Court flatly rejected those arguments:

> [T]he language employed to define "claim" in [the Code] makes no reference to purpose. The plain meaning of a "right to payment" is nothing more nor less than an enforceable obligation, *regardless of the objectives the State seeks to serve in imposing the obligation.*

Id. at 559 (emphasis added).

The Court in *Davenport* also rejected the state's plea for a policy exception to dischargeability, noting that "Congress defined 'debt' broadly and took care to except particular debts from discharge where policy considerations so warranted." *Id.* at 562. Congress created a statutory exception for criminal restitution orders in Chapter 7 but not Chapter 13. *Id.* at 563. That "statutory language plainly reveal[ed] Congress's intent not to except restitution orders from discharge in certain Chapter 13 proceedings." *Id.*

Similarly, in *Kovacs* the Court held that an affirmative clean-up injunction under a state's environmental laws was a dischargeable debt. 469 U.S. at 278. The State contended that the obligation was not a "debt" because it arose from breach of a regulatory statute. The Court rejected that contention as contrary to the Code's "broad definition of a 'claim.'" *Id.* at 279. The obligation was a "debt" because "the only performance sought from Kovacs was the payment of money." *Id.* at 283. Because the debt was not covered by any express exception to discharge, it "was dischargeable in bankruptcy." *Id.*

Davenport and *Kovacs* establish a clear test: if payment of money would satisfy an obligation, then the obligation is a "debt," and all debts are dischargeable unless expressly exempted from discharge by Congress. There is thus no merit to the FCC's argument that the payment obligations are not "debts" because non-payment might result in revocation of licenses without civil debt collection proceedings. FCC Br. 33. The Court rejected the identical argument in *Davenport*: a criminal restitution obligation is a debt, even if non-payment results in revocation of probation rather than civil debt collection. 495 U.S. at 559. Indeed, the threat of license revocation – like revocation of probation – is an extremely powerful weapon in the debt collector's arsenal. *See id.* Neither the "purpose" nor the "enforcement mechanism" of payment obligations places them outside the Code's definition of "claim" or "debt." *Id.* at 560.

The FCC also suggests that this case is special because NextWave's obligation is both a regulatory condition and a debt. But the critical holding in *Davenport* and *Kovacs* is that a regulatory condition that can be satisfied by the payment of money *is* a debt, and thus the FCC's effort to assign significance to the dual classification is unavailing. Indeed, in *Davenport* and *Kovacs*, the Court recognized the payment obligations as dischargeable debts when they lacked *any* contractual foundation and arose solely from regulatory requirements. This case is even easier because the source of NextWave's obligation is the Note, and the licenses and applicable regulations do no more than require payment of that Note. If the payment obligations in *Davenport* and *Kovacs* were dischargeable debts, then *a fortiori* NextWave's payment obligations are dischargeable debts. The FCC's approach would allow government creditors to treat obligations as either debts or regulatory conditions as the value of their collateral fluctuates, taking advantage of creditor protections under the Code when the value is low, and seizing the collateral when the value is high.

Davenport and *Kovacs* recognize that distorting the meaning of "debt" and "claim" in order to create a regulatory exemption, as the FCC requests, would wreak havoc with the reorganization process. Government creditors will have no difficulty positing a regulatory purpose for every payment obligation owed to them. Chapter 11 cannot function, however, if governmental creditors are able at their whim to seize critical assets or enforce debt obligations. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983). Indeed, the FCC's position would *harm* the government in other cases, because the government must have a "claim" to receive a distribution when a corporate debtor liquidates. *See Kovacs*, 469 U.S. at 286 (O'Connor, J., concurring). The FCC's *ad hoc* redefinition of "debt" cannot prevail here, as it would inappropriately "override the balance Congress struck." *Davenport*, 495 U.S. at 563.

B. The FCC Canceled The Licenses "Solely Because" NextWave Did Not Pay Its Debts To The FCC.

The FCC revoked NextWave's licenses "solely because" NextWave did not pay its license installment obligations while reorganizing. It is undisputed that nonpayment was the sole trigger for revocation of NextWave's licenses. The FCC order on review in this case states that "the C and F block licenses granted to NextWave *cancelled automatically* on October 30, 1998 *because NextWave failed to make its payment* by the redemption deadline of October 29, 1998." Pet. App. 58a-59a (emphases added); *see also id.* at 73a; FCC Br. 9-10. As the D.C. Circuit aptly observed, "[t]he Commission never denies that if NextWave had made its payments, the company could have retained its licenses." Pet. App. 38a.[13]

---

[13] The nonpayment that triggered the FCC's revocation of NextWave's licenses was required by the Bankruptcy Code. Reorganizing debtors may not make interim payments on pre-petition debts while reorganizing. The limited exceptions to that rule have no application here. The FCC did not request "adequate protection" for its collateral, and thus was not entitled to payments. *See In re Shannon*, 234 B.R. 676, 685 (B.A.P. 6th Cir. 1999). Similarly, the FCC did not request, and would not have been entitled to, payment under the "necessity of payment doctrine." *See B&W Enters., Inc. v. Goodman Oil Co.*, 713 F.2d 534 (9th Cir. 1983). Indeed, far from requesting interim payments, the FCC assured the bankruptcy court and NextWave that no payments were necessary to prevent cancellation while NextWave was in bankruptcy. *Supra* pp. 7-8, 10-11.

Seeking yet another way to import a regulatory exception into § 525, Petitioners contend that the statute should apply only when a governmental entity "is motivated solely . . . by fiscal concerns or hostility to the bankruptcy laws." FCC Br. 37. The "solely because" language in § 525, they contend, is "properly read as referring to the agency's purpose or motive." *Id.* at 39. But the text unambiguously forbids a governmental entity from revoking a license when the sole cause for doing so is one of three specified triggers: (i) the licensee's status as "a debtor under this title"; (ii) the licensee's insolvency before or during bankruptcy; or (iii) the licensee's non-payment of "a debt that is dischargeable in the case under this title." 11 U.S.C. § 525(a). That text says nothing about the underlying purpose or motive for choosing that trigger.[14]

Section 525's applicability is confirmed by the express regulatory exceptions that permit the Secretary of Agriculture to revoke licenses for dealers in perishable foodstuffs in the event of insolvency, bankruptcy, or nonpayment of debts, with the goal of preserving the integrity of regulated markets.[15] *Id.* Those exceptions would be superfluous if

---

[14] For that reason, Arctic Slope's discussion of "but for cause" is beside the point. Arctic Slope Br. 25. Petitioners have suggested no other trigger for the cancellation, and there is none. Arctic Slope confuses a decisionmaker's motives for selecting an exclusive criterion for the criterion itself.

[15] *See, e.g.*, 7 U.S.C. §§ 204, 228b, 499d(a), 499g(d); 7 C.F.R. § 46.9(b); *see also* H.R. Rep. No. 84-1196 at 2, 4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3701, 3703-04; *Consumers Prod. Co., Inc. v. Volante Wholesale Prod., Inc.*, 16 F.3d 1374, 1377-78 (3d Cir. 1994) (regulatory scheme "promote[s] fair

§ 525 were inapplicable to license revocations with a regulatory purpose. *TRW*, 122 S. Ct. at 447; *Hartford Underwriters*, 530 U.S. at 6-7.

The FCC's reading of § 525 would empty it of meaning. The government can always articulate *some* regulatory motive for automatic cancellation upon the occurrence of nonpayment or another of the prohibited triggers. On its face, the relevant prohibition of § 525 applies *only* to government actions – licensing decisions – that involve the exercise of regulatory power. Indeed, if § 525 applied only when the government is pursuing its pecuniary interests, then § 525 would not preclude revocations based on failure to pay debts to private parties (where the government has no pecuniary interest at all), even though Congress plainly expected § 525 to apply in those circumstances. *See infra* p. 27.

Nor is there merit to the FCC's suggestion that the "solely because" element of § 525 can be evaded merely by writing a "regulatory license condition" into the license itself. *See* FCC Br. 40. This is just another version of the FCC's contention – refuted by *Davenport* and *Kovacs* – that the payment obligation is not a "debt" simply because it is a regulatory condition. If inserting the ground for cancellation into the license itself were enough to circumvent § 525, agencies could opt out of the statute at will – as the FCC has sought to do here by conditioning NextWave's license on payment of its Note obligations. For example, under the FCC's position, licenses could contain conditions providing for automatic cancellation triggered by filing for bankruptcy. Yet even the FCC effectively acknowledges that § 525 prohibits license cancellations triggered by bankruptcy filings, whether or not the agency has a regulatory purpose. FCC Br. 37.

Section 525's legislative history also refutes the FCC's argument. The House Report stresses that § 525 bars license

---

trading practices in the marketing of perishable agricultural commodities").

cancellation as an "automatic reaction," even "where the causes of a bankruptcy are intimately connected with a license." H.R. Rep. No. 95-595, at 165 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6126. In such instances, agencies may "pursue appropriate regulatory policies," but only through "an examination into the circumstances surrounding the bankruptcy," not by "automatic reaction." *Id.* The FCC's "automatic cancellation" rule is the very "automatic reaction" § 525 forbids.[16]

Finally, the FCC's position is inconsistent with *Perez v. Campbell*, 402 U.S. 637 (1971), from which § 525 derives. In *Perez*, the Court struck down an Arizona statute that suspended the license of any driver who failed to pay an outstanding tort judgment arising from a car accident, regardless of whether bankruptcy law relieved the driver of the obligation to pay. As Petitioners concede, FCC Br. 30, in enacting § 525 Congress intended to incorporate the result in *Perez*. Accordingly, while *Perez* cannot "define the outer limits of the statute's coverage," *New York v. FERC*, 122 S. Ct. 1012, 1025 (2002), § 525 must be construed to cover *Perez*. *See* 123 Cong. Rec. 216, 219 (daily ed. Jan. 4, 1977) (statement of Rep. Edwards) (§ 525 codifies and expands *Perez*).

Perez overruled two prior decisions, *Kesler v. Department of Public Safety*, 369 U.S. 153 (1962), and *Reitz v. Mealey*, 314 U.S. 33 (1941), which had held that statutes similar to that at issue in *Perez* did not conflict with the bankruptcy laws be-

---

[16] The FCC seeks to create the impression that its cancellation of the licenses reflects some broader analysis of the circumstances surrounding NextWave's bankruptcy. That is not so. No inquiry was made into NextWave's fitness to hold the licenses when the FCC acted to cancel the licenses; non-payment was the *only* trigger. *See* Pet. App. 47a (FCC made no effort to consider any "extrinsic evidence of fitness to hold a license"). Nor was any such analysis undertaken in the *Restructuring Orders*. *See* FCC Br. 39-40. Indeed, those orders merely set forth formally the FCC's motives and purpose for selecting nonpayment as the sole trigger for automatic cancellation.

cause they had the regulatory purpose of promoting highway safety. *Perez*, 402 U.S. at 650-52. *Perez* rejected the notion that a government agency could justify the denial or cancellation of a license by asserting that some government "interest or policy" underlies use of a prohibited trigger, because that would nullify the prohibition. *Id.* at 651-52. The FCC's argument that § 525 permits "regulatory" license cancellations thus imputes to Congress an intent not to codify *Perez*, but to resurrect *Kesler* and *Reitz*.

C. Section 525 Is Not Limited To Discrimination Of The Kind The FCC Posits.

Petitioners next contend that § 525 should be read narrowly to bar only "discrimination" between bankruptcy debtors who do not pay dischargeable debts and non-bankrupts who simply fail to pay their debts. FCC Br. 40-42. But the plain language of § 525 makes clear that it is not limited to "discrimination." To "discriminate" is but one of nine separate and independently operative prohibitions listed in § 525(a). Section 525's prohibition against "revok[ing]" a license is distinct from its prohibition of discriminatory treatment. The FCC's interpretation would impermissibly read out of the statute the prohibition against license revocation, as well as most of the remainder of § 525. *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 35-36 (1992); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).[17]

Unable to rely on the statute's text, the FCC again asserts that its narrow reading of § 525 is compelled by *Perez*, which the FCC claims "involved a state law that discriminated against persons who had previously sought bankruptcy protection." FCC Br. 30. But the opposite is true. *Perez* in-

[17] Petitioners point to § 525's title, but it does no more than "indicate the provision[] in a most general manner" and "cannot limit the plain meaning of the text." *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947); *accord Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 483 (2001).

validated a regulatory requirement that applied to everyone in Arizona who did not pay their tort judgment debts, regardless of their bankruptcy status. 402 U.S. at 641-42. The FCC's attempt to use *Perez* to narrow the statutory text is thus completely meritless.[18]

D. Nothing In The Second Circuit's Decisions Is Inconsistent With Applying § 525 As Written.

Lacking any support in the text of § 525, Petitioners contend that the Second Circuit's decisions in NextWave's bankruptcy case somehow defeat the application of § 525 here. According to Petitioners, the Second Circuit held that the bankruptcy court lacks the power to "alter or modify" NextWave's debts to the FCC, thus establishing that the debts are not "dischargeable *in the case under this title*," 11 U.S.C. § 525(a) (emphasis added). FCC Br. 30; *see also id.* at 16, 20; Arctic Slope Br. 30. That argument fails for three reasons: (i) the text of the Bankruptcy Code conclusively establishes that NextWave's debts to the FCC are dischargeable in its bankruptcy case; (ii) the Second Circuit never held that the bankruptcy court lacks the power to alter or modify, much less to discharge, the debts; and (iii) Petitioners' misreading of the Second Circuit is no help to them in any event, because a debt can be "dischargeable" even if the bankruptcy court cannot alter or modify it.

1. The plain language of the Code establishes that NextWave's debts to the FCC are dischargeable in the bankruptcy court. Under the Code, debts are discharged by operation of law pursuant to § 1141, which provides that

[18] In all events, this case, like *Perez*, does involve discrimination against bankruptcy debtors insofar as they are penalized for availing themselves of the Code's protections. *See Perez*, 402 U.S. at 651-62 (license denial for non-payment "frustrates" bankruptcy laws). Because a bankruptcy debtor may not make interim payments on pre-petition debts, *see* note 13 *supra*, the relevant comparison is with a non-bankrupt that has satisfied its liability on a debt by payment or otherwise, not with those non-bankrupts that have failed to pay with no legal justification.

"confirmation [of a plan of reorganization] . . . discharges the debtor from *any debt* that arose before the date of such confirmation." 11 U.S.C. § 1141(d)(1)(A) (emphasis added). Plan confirmation is a "core proceeding" within the bankruptcy judge's jurisdiction. 28 U.S.C. § 157(b)(2)(L); *see also id.* §§ 157(b)(2)(I)-(J), 1334. Because NextWave's obligations to the FCC are debts, they are dischargeable in the bankruptcy court case. *See supra* pp. 20-24. The plain meaning of the Code thus forecloses any argument that NextWave's debts are not "dischargeable in the case under this title."[19]

2. ***The Second Circuit did not hold that the bankruptcy court lacks the power to discharge NextWave's debts.*** Contrary to Petitioners' contentions, the Second Circuit did not consider whether NextWave's obligations to the FCC are dischargeable. Pet. App. 127a ("we have no occasion to express an opinion" whether Bankruptcy Code precludes revocation); *see supra* p. 11. Indeed, the words "discharge" and "dischargeable" never appear in either decision. Nor did the Second Circuit mention § 1141(d), which expressly discharges "any" preconfirmation debt. Thus, it is hardly surprising that, after giving the question careful consideration, the D.C. Circuit held that the Second Circuit's decisions have no preclusive effect respecting § 525. Pet. App. 22a-36a.[20] Because Petitioners did not seek certiorari to

[19] Bankruptcy court jurisdiction over proceedings arising under Title 11 – such as plan confirmation and discharge – exists "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district court." 28 U.S.C. § 1334(b); *see id.* § 157. Thus, the bankruptcy court cannot be ousted from its "core" jurisdiction to confirm plans by 28 U.S.C. § 2342 or 47 U.S.C. § 402, which generally give the courts of appeals exclusive jurisdiction to review FCC orders. Indeed, as Petitioners themselves stress, the courts of appeals *lack* jurisdiction to enter orders actually discharging debts, because bankruptcy courts have exclusive jurisdiction to do so. FCC Br. 32; Arctic Slope Br. 32.

[20] The D.C. Circuit also rejected the narrower contention that anything in the Second Circuit's jurisdictional rulings might preclude the bankruptcy court from discharging NextWave's debts to the FCC. Again, the court concluded that there was no preclusion as to that issue, because under at least one reading of the Second Circuit's opinions the debt "*was* dischargeable by the bankruptcy court." *Id.* at 42a. Although the D.C. Circuit acknowledged that some statements by the Second Circuit might suggest that the bankruptcy court could not discharge the debts if NextWave kept the licenses – at least if "discharge" is equated with "alter," *id.*, no preclusion can arise from such ambiguities, *id.* at 36a.

review the D.C. Circuit's ruling rejecting their preclusion argument, they cannot now contend that the Second Circuit's holdings are preclusive. The issue before this Court is what § 525 means, not what the Second Circuit might have meant.

Moreover, the Second Circuit did not hold that the bankruptcy court lacks the power to "alter or modify" NextWave's debt to the FCC. As the D.C. Circuit explained, the Second Circuit merely "held that the Commission's *license cancellation* was a regulatory act reviewable only by a court of appeals." Pet. App. 24a. (emphasis added). The Second Circuit recognized that the bankruptcy court has jurisdiction over the disposition of NextWave's debts for bankruptcy purposes. Pet. App. 236a, 237a. The Second Circuit's consideration of the *merits* of NextWave's avoidance claim, *id.* at 237a-252a, confirms that, under that court's approach, the bankruptcy court *does* retain its ordinary jurisdiction to dispose of NextWave's debts to the FCC, although it lacks jurisdiction to address the regulatory consequences of any adjustment to these debts. Thus, under the Second Circuit's decisions, if the bankruptcy court exercises its jurisdiction to adjust NextWave's debts and the FCC reacts by canceling the licenses, then only a court of appeals could *review the license cancellation* and set it aside if unlawful. But nothing in that division of authority prevents the bankruptcy court from discharging NextWave's debts to the

FCC by confirming a plan of reorganization in the ordinary course of NextWave's bankruptcy proceeding.[21]

In this regard, Petitioners' argument that the *D.C. Circuit* cannot discharge NextWave's debt is a red herring. To be sure, the bankruptcy court has exclusive jurisdiction to enter a confirmation order that actually discharges a debt – as Petitioners themselves recognize. FCC Br. 32; Arctic Slope Br. 32. At the same time, the APA and 47 U.S.C. § 402(b) unambiguously give the *D.C. Circuit* the authority to decide whether the FCC's license revocation violates § 525, and thus to decide whether NextWave's debts are "dischargeable" within the meaning of that provision. *See generally* 4 Collier on Bankruptcy ¶ 523.03, at 523-16 to -17 (15th ed. rev. 2002) (courts other than bankruptcy court have jurisdiction to decide whether debts are "dischargeable").

3. The FCC's misreading of the Second Circuit's decisions does not help it here. Even if the Second Circuit had held that the bankruptcy court lacks the power to "alter" or "modify" NextWave's debts to the FCC, such a holding would not establish that the debts are nondischargeable. Under the Code, discharging a debt does not invariably alter or modify the terms or amount of the debt.

Section 1141 unambiguously provides that confirmation discharges "any" pre-confirmation debt. 11 U.S.C. § 1141(d). It does not distinguish between claims that are altered and those that are left unaltered.[22] Thus, a debt is discharged when a reorganization plan provides for full payment of a

---

[21] Such bifurcated jurisdiction is not extraordinary in bankruptcy (although it would not be required here absent the Second Circuit's rulings, *see* 28 U.S.C. § 1334(b)). There are other contexts in which a bankruptcy court may have to stay its hand until another tribunal rules. *See, e.g., Nathanson*, 344 U.S. at 30; 28 U.S.C. § 1334(c)(2); *In re Burger Boys, Inc.*, 183 B.R. 682 (S.D.N.Y. 1994).

[22] Alteration of a creditor's rights is the defining element of impairment, not discharge. 11 U.S.C. § 1124.

claim according to the original terms of the obligation, even though the amount of the debt is not altered or modified by the confirmed plan. *See id.* §§ 1124, 1126(f), 1129, 1141(d). When that occurs, the discharged debt is replaced by a new debt with the same terms. That is because under Chapter 11, "a valid plan substitutes, in much the same way as a common law novation would, the obligations as stated in the plan for all preconfirmation claims and interests." 7 Collier ¶ 1129.01[1], at 1129-12; *accord In re Benjamin Coal Co.*, 978 F.2d 823, 827 (3d Cir. 1992). When a Chapter 11 plan leaves an old debt unaltered, "[t]he effect of confirmation is to discharge the *entire* pre-confirmation debt, *replacing* it with a *new indebtedness* as provided in the confirmed plan." *In re Penrod*, 169 B.R. 910, 916 (Bankr. N.D. Ind. 1994) (emphasis added), *aff'd*, 50 F.3d 459 (7th Cir. 1995). Thus, even if the Second Circuit's decisions were (incorrectly) read to hold that a bankruptcy court may not *alter or modify* NextWave's debts to the FCC, the debts would nevertheless remain *dischargeable*. Indeed, the FCC's approach would result in the anomaly that a debtor would obtain the protections of a bankruptcy discharge – including the shield of § 525 – only if it paid *less* than it originally owed on a claim, but not if the debtor's plan provided for payment of the claim in full.

Finally, Congress's choice of the word "discharge*able*" indicates that § 525 applies to any debt *capable of* being discharged. Even Petitioners concede that under the Second Circuit's rulings, if NextWave surrenders its licenses, "the Bankruptcy Court could deal with that debt [to the FCC] in the bankruptcy case with NextWave's other debts." Arctic Slope Br. 31; FCC Br. 28. That concession demonstrates that, even under Petitioners' view, the debts to the FCC are discharge*able* in the bankruptcy case, and thus are covered by § 525.

II. THE STRUCTURE AND PURPOSES OF THE BANKRUPTCY CODE REINFORCE § 525'S PLAIN MEANING .

The structure and purposes of the Bankruptcy Code underscore the need to give § 525 its plain meaning and deny the FCC's request for a regulatory exception.

A. Section 525 Is An Essential Feature Of The Code's Structural Protection Of The Reorganization Process.

The prime purposes of Chapter 11 are "preserving going concerns and maximizing property available to satisfy creditors." *Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999); *accord Bildisco*, 465 U.S. at 528; H.R. Rep. No. 95-595, at 220, *reprinted in* 1978 U.S.C.C.A.N. at 6179 (reorganization is "more economically efficient" than liquidation). The Code also seeks to ensure "equality of distribution among creditors of the debtor." *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991).

The Bankruptcy Code forms a comprehensive structural framework designed to promote these objectives. The Code's goals are achieved in a Chapter 11 case through eventual confirmation of a plan of reorganization that restructures all of the debtor's payment obligations in a manner that gives each creditor its due and allows the debtor to emerge as a going concern. To that end, the Code makes an "overall effort to give the debtor-in-possession some flexibility and breathing space." *Bildisco*, 465 U.S. at 532.

Numerous Code provisions work together to protect the debtor's assets and allow for reorganization. The automatic stay bars actions that could interfere with efforts to reorganize, subject only to certain targeted exceptions. 11 U.S.C. § 362; *see also infra* pp. 38-39. The Code also "modifies the procedural rights available to [secured] creditors to protect and satisfy their liens," *Whiting Pools*, 462 U.S. at 206, suspending their rights to proceed against collateral. 11

U.S.C. § 362(a)(4), (a)(5); *id.* § 542(a); *Whiting Pools*, 462 U.S. at 204. Further, the Code prevents preferential transfers of assets to individual creditors. *Bieger v. IRS*, 496 U.S. 53, 58 (1990); *Whiting Pools*, 462 U.S. at 205 & n.10, 208-09.

Similarly, the Code prevents a debtor from being forced to make interim payments to creditors to avoid defaulting on obligations during the case. Sections 1123 and 1124 give debtors a right to cure "any default" at the time of plan confirmation. *See infra* p. 70. The right to cure ensures that the threat of cancellation resulting from default cannot be used to force a debtor to make preferential payments to any creditor to preserve assets before the debtor knows which assets will be needed for the reorganization. *See* S. Rep. No. 95-989, 120 (1978), *reprinted in* U.S.C.C.A.N. at 5906 ("The intervention of bankruptcy and the defaults represent a temporary crisis which the plan of reorganization is intended to clear away . . . . Curing of the default and assumption of the debt in accordance with its terms is an important reorganization technique for dealing with a particular class of claims, especially secured claims.")

Section 365, which governs "executory contracts," provides similar protections. Indeed, although the FCC contends that an "analogy" to executory contracts supports its reading of § 525, FCC Br. 33, the opposite is true: the debtor may ordinarily cure defaults under an executory contract any time up to plan confirmation. 11 U.S.C. §§ 365(b)(1), 1123(b)(2); 3 Collier ¶ 365.05[3][c], at 365-50; *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1215 (7th Cir. 1984).[23]

---

[23] Petitioners do not contend spectrum licenses *are* executory contracts, and no court has so held. *See* FCC Br. 33 (arguing "by analogy"); Arctic Slope Br. 30 (government licenses "should not be" considered executory contracts). The FCC did not rely on that argument in its order on review, and it was not presented to or passed on by the court below or raised in the petitions for certiorari. The argument is thus waived. *Lopez v. Davis*, 531 U.S. 230, 244 n.6 (2001). Moreover, it would contradict Petitioners'

Section 525 functions together with these provisions to restrict government actions that can frustrate the reorganization of a regulated entity that has "avail[ed] [it]self of the protection of the bankruptcy laws," H.R. Rep. No. 95-595, at 165, *reprinted in* 1978 U.S.C.C.A.N. at 6126. When any of the prohibitions of § 525 apply, a governmental entity is not permitted to take actions that would prevent a debtor from reorganizing and creditors from obtaining recoveries. Section 525 thus preserves what is often the *sine qua non* of a reorganization – the licensees – thereby protecting the right to cure defaults and guaranteeing the "breathing space" necessary to realize the economic efficiencies of reorganization for the benefit of all creditors. *Bildisco*, 465 U.S. at 532.

The FCC's position, in contrast, demolishes Congress's careful statutory structure. The right to cure defaults, and indeed, the very promise of reorganization, would be extinguished if licensing agencies could revoke essential licenses during the bankruptcy case based solely on a licensee's filing for bankruptcy or not paying a debt while reorganizing.

---

position that the licenses are regulatory arrangements rather than ordinary commercial contracts.

Further, an assertion that licenses are executory contracts would require the Court to address circuit splits about § 365 in a case in which the applicability of that section is not even remotely at issue. *Compare* FCC Br. 35 n.11 (arguing that payment obligations under executory contracts are not "debts") *with In re Stewart Foods, Inc.*, 64 F.3d 141, 144-45 (4th Cir. 1995) (rejecting argument); *compare* Arctic Slope Br. 31 n.8 (arguing that debtor cannot assume non-assignable executory contract) *with Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997) (rejecting argument). Petitioners also incorrectly assert that NextWave conceded in its opposition to the petitions for certiorari that obligations under an executory contract are non-dischargeable. FCC Br. 34; Arctic Slope Br. 30 n.7. In fact, NextWave correctly argued that once a debtor assumes a contract, it must perform the contract's original terms – which is separate from the question whether the debts are discharged. NextWave Br. in Opp. 17-18 (making argument in context of agreement to convey spectrum licenses, which could be executory contracts, rather than licenses themselves, which are not).

Equality of distribution would also be defeated, as governmental creditors could use the self-help remedy of license revocation to achieve satisfaction of their claims, leaving nothing to satisfy the claims of other creditors. Worse yet, government entities with claims against the debtor – like the FCC here – could take advantage of the bankruptcy process when it suits them and then opt out the moment doing so would advance their perceived interests.

This case proves the point: the FCC's cancellation of the licenses threatens to derail a reorganization that provides for payment in full to all creditors. The only winner would be the FCC, which would profit enormously while the claims of other creditors would be rendered worthless. Moreover, the FCC used its status as a secured creditor in the Chapter 11 process to its advantage during the period when spectrum values were depressed, *see supra* pp. 7-8, 10, but then sought to exit the process and assert regulatory prerogatives when the value of the licenses had rebounded. Section 525 forecloses that kind of opportunistic conduct.

The Bankruptcy Code is structured to permit businesses to rehabilitate and cure delinquent financial obligations. The import of the FCC's position is effectively to deny a licensee that owes a financial obligation to a licensing authority the opportunity to reorganize under the Code when it encounters a temporary financial crisis. The summary destruction of a debtor solely for failure to satisfy a financial debt to a government agency while in bankruptcy contravenes the very essence of the Code.

B. The Code's Structure Defeats The FCC's Attempt To Create A General Regulatory Exception.

In light of the foregoing, Petitioners cannot come close to meeting their "exceptionally heavy" burden of proving that Congress intended the plain language of § 525 to mean other than what it says. *Wolas*, 502 U.S. at 155-56; *Patterson v. Shumate*, 504 U.S. 753, 760 (1992). The FCC tries to meet that

burden by arguing that applying § 525 according to its terms cannot be reconciled with the "police powers" exception to certain provisions of the automatic stay, 11 U.S.C. § 362(b)(4). FCC Br. 43-47. That argument is meritless.

First, *Davenport* rejected the virtually identical argument that discharge of criminal restitution obligations in Chapter 13 would be inconsistent with the criminal enforcement exception to the automatic stay, § 362(b)(1). As the Court held, the conflict was illusory: "Congress could well have concluded that maintaining criminal prosecutions during bankruptcy proceedings is essential to the functioning of government but that . . . a debtor's interest in full and complete release of his obligations outweighs society's interest in collecting or enforcing a restitution obligation . . . ." 495 U.S. at 561. The same is true here. Congress could readily have concluded that exercising police powers during bankruptcy is important to protect the health and safety of the public, but that a debtor's interest in reorganization and discharge outweighs the government's interest in canceling licenses in response to a narrow range of financial triggers – including non-payment of a dischargeable debt.[24]

Second, the text of § 362 itself refutes the FCC's argument. Section 362(b)(4) exempts a narrowly defined set of regulatory actions from *some* components of the automatic stay, *but not from others*. 11 U.S.C. § 362(b)(4) (exemption from § 362(a)(1), (a)(2), (a)(3), or (a)(6), but not § 362(a)(4), (a)(5), (a)(7), or (a)(8)). Indeed, the FCC's cancellation of NextWave's licenses contravened the automatic stay provisions covering liens, to which the police powers exception

[24] Similarly, in *Kovacs*, the Solicitor General advanced – and the Court rejected – the analogous argument that "it would be anomalous indeed to hold that an action such as the present one is exempt from the automatic stay, which it clearly is, but to rule years later that the debtor's obligation is dischargeable in bankruptcy." Brief for the United States at 16, *Kovacs*, 469 U.S. 274.

does *not* apply. Pet. App. 40a-41a. Moreover, § 362(b)(4) merely provides an exemption from portions of the automatic stay to allow regulatory procedures to go forward; it does not authorize regulatory acts prohibited by other sections of the Code, such as § 525. Nor could it. If the FCC's argument were correct, then any governmental agency could override the Code by asserting a regulatory purpose, a proposition flatly rejected by *Davenport* and *Kovacs*.[25]

When Congress concludes that regulatory interests need protection, it crafts *express* regulatory exceptions. Section 525 itself expressly exempts certain Agriculture Department programs. *Supra* pp. 25-26. Similarly, § 523 exempts certain "regulatory" debts from discharge. 11 U.S.C. § 523(a)(1), (a)(7), (a)(8), (a)(12), (a)(13). The automatic stay, too, contains several specific regulatory exceptions, in addition to the "police powers" exception that Petitioners try to universalize – all of which would be superfluous were the FCC's structural argument correct. *Id.* § 362(b)(8), (b)(12), (b)(13), (b)(16).

The Bankruptcy Code is a statute potentially applicable to every credit transaction, and must remain a stable and predictable set of rules that creditors can rely on for clear notice of how their claims will be treated if a debtor becomes insolvent. This Court has consistently preserved that essential stability and predictability by rejecting government

[25] *Board of Governors v. MCorp Financial, Inc.*, 502 U.S. 32 (1991), is not to the contrary. *MCorp* concerned a bankruptcy court's power to enjoin certain ongoing administrative proceedings, notwithstanding a statute providing that "no court" shall have such jurisdiction. *Id.* at 38-39 (citing 12 U.S.C. § 1818(i)(1)). The Court rejected the argument that § 362(b)(4) *itself* gives the bankruptcy court jurisdiction to engage in substantive review of an agency's actions to determine if they are valid. *Id.* at 40. At the same time, the Court recognized that the bankruptcy court might well have jurisdiction to enjoin an attempt by an agency to *enforce* a final order against a debtor, notwithstanding § 362(b)(4). *Id.* at 40-41. Nothing in *MCorp* suggests that § 362(b)(4) exempts regulatory action from other sections of the Code that apply by their terms.

requests to create implied regulatory exceptions to the Code. *See, e.g., Whiting Pools*, 462 U.S. at 209. It should do the same here.

C. NextWave's Right To Cure Pre-Confirmation Defaults Provides An Independent Basis For Affirmance.

In light of the foregoing, it should not be surprising that § 525 is not the only provision of the Code that prevents the FCC's cancellation of NextWave's licenses. Most obviously, the FCC's actions are contrary to NextWave's right to cure defaults under 11 U.S.C. §§ 1123(a)(5)(G) and 1124(2)(A). These provisions, which NextWave raised below and the D.C. Circuit reserved, Pet. App. 16a, 51a, provide independent grounds for affirmance. Under these sections of the Code, if a debtor's reorganization plan provides for the debtor to cure its pre-confirmation defaults (with interest) under its original agreement with a creditor and resume payments under the original terms going forward, the cure nullifies the defaults and restores the *status quo ante*. "In short, 'curing a default' in Chapter 11 means . . . the event of default is remedied and the consequences are nullified." *In re Taddeo*, 685 F.2d 24, 29 (2d Cir. 1982). Under those conditions, the creditor is not "impaired" and cannot block the debtor's plan. 11 U.S.C. §§ 1124(2), 1126(f); 7 Collier ¶ 1124.01[1], at 1124-3. NextWave's two proposed plans provided for cure of past defaults and payment going forward according to the original terms of the Notes and licenses. The FCC was therefore unimpaired and could not lawfully block those plans. The FCC's attempt to veto the plans by canceling the licenses despite NextWave's cure is exactly the kind of self-help the right to cure forecloses.

III. SECTION 525 DOES NOT CONFLICT WITH THE COMMUNICATIONS ACT.

Unable to carve out a regulatory exception from § 525, the FCC seeks to override that provision entirely by assert-

ing that a straightforward reading of § 525 would create an irreconcilable conflict with the Communications Act – a conflict that can be avoided, the FCC suggests, only by giving § 525 a meaning different from "what the lawmakers must have had in mind." FCC Br. 21 (quotation omitted). But § 525 neither forbids anything the Communications Act requires nor obstructs the FCC's power to fulfill any statutory command.

A. Section 525 Does Not Conflict With Any Requirement Of The Communications Act.

There is no conflict between § 525 and the Communications Act. Section 525 forbids governmental entities from revoking licenses solely because a licensee has filed for bankruptcy or failed to pay a dischargeable debt.

In effect, the FCC is claiming that Congress's enactment of § 309(j) of the Communications Act repealed § 525 to the extent it applies to spectrum auctions. FCC Br. 47-50. But "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 122 S. Ct. 593, 604-05 (2001). Section 309(j) is not "irreconcilable" with § 525. Both statutes are "capable of coexistence," *id.* at 605, because nothing in § 309(j) purports to require that licenses, once awarded to a successful bidder pursuant to an auction, must be revoked solely because the licensee defers a payment while in bankruptcy. Indeed, nothing in the Act requires the FCC to create a creditor-debtor relationship in the first place by offering an installment payment option, *see* 47 U.S.C. § 309(j)(4)(A) (FCC shall "consider" guaranteed installment payments) – as the FCC confirmed by eliminating that option. Section 525 must therefore be given full effect.

What the FCC describes as a "conflict" is nothing more than a preference on its part to revoke spectrum licenses for nonpayment of installment obligations notwithstanding § 525. But the FCC cannot prevail merely by showing that

the Code conflicts with an FCC regulation or policy choice. It is a bedrock principle of administrative law that an agency such as the FCC cannot violate other federal statutes when making policy under its own organic statute. Pursuant to 47 U.S.C. § 402(b), (g), judicial review of FCC licensing determinations is governed by the APA, which requires that a court "hold unlawful and set aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(2). As the D.C. Circuit held, "[t]his provision requires [a court] to invalidate agency action not only if it conflicts with an agency's own statute, but also if it conflicts with another federal law." Pet. App. 36a; *accord Cousins v. Secretary of the United States Dep't of Transp.*, 880 F.2d 603, 608 (1st Cir. 1989) (Breyer, J.).

In *Bildisco*, the Court applied that principle in refusing to enforce an order of the NLRB that was "directly counter to the express provisions of the Bankruptcy Code and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space." 465 U.S. at 529 n.9. The Court reaffirmed that principle last term in invalidating an NLRB remedial order on the ground that it "trench[ed] upon a federal statute . . . outside the Board's competence to administer." *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275, 1282 (2002). When Congress has "directly spoken to the precise question at issue," *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) – whether in the agency's organic statute or in another statute such as the Bankruptcy Code – an agency may not ignore Congress's command.

B. Section 525 Does Not Obstruct The FCC's Exercise Of Its Licensing Or Auction Authority.

Because there is no conflict between § 525 and the Communications Act, the FCC strains to manufacture one. Specifically, the FCC asserts that enforcing § 525 as written will deny the FCC its exclusive authority to issue licenses and its

ability to use auctions to allocate spectrum pursuant to § 309(j) of the Act. Those "conflicts" are illusory.

1. ***Applying § 525 as written does not conflict with the FCC's licensing authority.*** The D.C. Circuit's interpretation of § 525 creates no conflict with the FCC's "exclusive authority to grant telecommunications licenses." FCC Br. 2, 22, 26-28. In challenging the decision, the FCC contends that "a bankruptcy court has no authority to require the Commission to license an entity that is not qualified." *Id.* at 27. But that argument is entirely misplaced. The D.C. Circuit, and not a bankruptcy court, invalidated the revocation of NextWave's licenses. The D.C. Circuit has unquestioned authority to review FCC orders revoking radio spectrum licenses, 47 U.S.C. § 402(b)(5), and to set aside such orders if they are contrary to law, 5 U.S.C. § 706(2); *see* 47 U.S.C. § 402(g). None of the cases selectively quoted by Petitioners suggests that the FCC's licensing decisions are unreviewable or may not be set aside if they violate a federal statute. *See, e.g., Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10 (1942) (recognizing that court reviewing licensing order has power to "lay[] bare a misconception of law and compel[] correction" by the FCC). The passages quoted by the FCC apply a *different* administrative law principle: in a matter delegated by Congress to an agency for an exercise of *discretion*, the reviewing court may not substitute its discretion for that of the agency. *E.g., id.* at 14; *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946). But the FCC has no discretion to revoke licenses on the basis of criteria that federal statutes forbid.

2. ***Applying § 525 as written does not prevent the FCC from exercising its auction authority.*** Equally unpersuasive is the FCC's contention that § 525 interferes with the FCC's ability to use auctions to allocate spectrum. There is no incompatibility between using auctions to allocate spectrum and applying the bankruptcy laws as written. Nor is there any risk that the bankruptcy laws will facilitate insincere bidding that threatens auction integrity. And the FCC has

ample means to protect its regulatory interests without relying on an automatic cancellation rule that § 525 forbids.

a. There is nothing inconsistent about applying the bankruptcy laws in the context of the "market-based mechanism" – *i.e.*, auctions – by which spectrum licenses are allocated pursuant to § 309(j) of the Act. *See* FCC Br. 22. Far from undermining the efficient allocation of resources, the bankruptcy laws – which form the backdrop for all market transactions – provide an efficient mechanism for dealing with the problem of insolvency and, in Congress's view, prevent market inefficiencies. *See* H.R. Rep. No. 95-595 at 220, *reprinted in* 1978 U.S.C.C.A.N. at 5787. The fact that some successful auction participants may subsequently invoke the protections of bankruptcy to reorganize does not render the auction process unworkable, or impair its accuracy or usefulness as a means for allocating spectrum efficiently.

This is confirmed by recent experience in the capital-intensive telecommunications sector, which is particularly vulnerable in tight capital markets. In recent years, many companies that acquired spectrum licenses via FCC auctions have been forced to reorganize as a result of their inability to obtain financing for needed capital investments. Some of those companies obtained private financing for their licensing obligations. Others, like NextWave, were financed directly by the FCC. The FCC does not suggest, nor could it, that the auction mechanism is in any way imperiled by the fact that licensees may have restructured *private* debt incurred to finance license purchases at auction. Licensees financed by the FCC are no different. Far from threatening the auction process, bankruptcy laws allow the auction mechanism to work in the first place by providing lenders and investors with a stable and predictable framework for protecting their interests in the event of a licensee's insolvency. Unless investors and lenders know they will have the protection of § 525, they will not invest in companies

that rely on an FCC installment payment plan to finance their licenses.

This point applies with particular force in the present context, where – contrary to the FCC's contention – Congress rejected a policy of allocating licenses based only on "willingness and ability to pay the most for the license," FCC Br. 15. When Congress enacted § 309(j), it sought to "avoid[] excessive concentration of licenses," 47 U.S.C. § 309(j)(3)(B), and instructed the FCC to "ensure that small businesses . . . are given the opportunity to participate in the provision of spectrum-based services." *Id.* § 309(j)(4)(D); *see also id.* § 309(j)(3)(B) (FCC should "disseminat[e] licenses among a wide variety of applicants, including small businesses"). The C-Block auction and the installment payment plan at issue here were efforts to further those objectives, not to assign licenses to the giant incumbents willing to pay the most for them.

Given economic realities, Congress was surely aware of the risk that small companies might be unable to raise capital, particularly during tight capital markets or a temporary decline in the market value of the licenses. *See In re Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 F.C.C.R. 2348, ¶ 233 (1994) (recognizing that small companies would usually have trouble raising capital *before* auction and would thus be dependent on capital markets *after* auction); H.R. Rep. No. 103-111 at 255, *reprinted in* 1993 U.S.C.C.A.N. at 582 (recognizing that businesses with "a high risk factor" may be appropriate licensees); H.R. Rep. No. 105-801, at 16 (for small businesses, the "only way participating companies could pay for licenses was by accessing the capital markets").

Indeed, the limited capital of small businesses was the very reason Congress directed the FCC to consider installment payment plans. Congress envisioned that the FCC might choose to extend credit to bidders for some licenses.

47 U.S.C. § 309(j)(4)(A); *see also* H.R. Rep. No. 103-111, at 255, *reprinted in* 1993 U.S.C.C.A.N. at 582 (Congress "anticipates that in some instances the Commission will act in a manner that is comparable to a mortgage banker, who designs new mortgage instruments in order to increase the universe of people who can afford to buy homes"). Having authorized debt financing, Congress must have intended that the usual background rules would apply to the resulting debtor-creditor relationships. *See In re Jartran, Inc.*, 732 F.2d 584, 590 (7th Cir. 1984) ("All creditors, to some extent, assume the risk of bankruptcy"); *cf. Franconia Assocs. v. United States*, No. 01-455, 2002 WL 1270248, at *8 (U.S. June 10, 2002) ("when the United States enters into contractual relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals") (quotation and citation omitted).

Application of bankruptcy law in this context furthers congressional intent by ensuring that small businesses without ready capital can obtain breathing room to reorganize during market downturns. In contrast, the FCC's position would frustrate congressional intent, as the fate of the C-Block licensees starkly illustrates. Because of a market downturn, virtually every C-Block licensee either filed for bankruptcy protection or returned licenses to the FCC. *Supra* pp. 5-6 & n.5. And when the FCC reauctioned those licenses, the vast majority ended up in the hands of giants such as Verizon Wireless, *supra* pp. 12-13, resulting in precisely the concentration Congress instructed the FCC to forestall.[26]

---

[26] The FCC also asserts that "prompt cancellation of licenses for failure to meet bid obligations facilitates expeditious reclamation and prompt re-auction," thereby speeding provision of competitive wireless services to the public. FCC Br. 25. That claim rings especially hollow here, where the FCC waited 15 months after NextWave did not make its October 1998 installment payment before even beginning the lengthy process of reassigning the licenses to other companies. Indeed, it is striking that the

In view of all of this, Congress's silence in § 309(j) respecting the applicability of the Bankruptcy Code cannot plausibly support an inference that Congress intended to repeal § 525 or any other aspect of the Code. To the contrary, the only plausible inference is an intent that the bankruptcy laws apply as written.[27]

b. Giving effect to § 525's plain terms will not create incentives for insincere bidding. *See* FCC Br. 24. There is simply no realistic prospect of the kind of insincere bidding the FCC posits, as the facts of this case make clear. In order to participate in the C-Block auction and make its down-payments, NextWave raised $600 million in initial financing, from institutional investors such as banks, insurance companies and pension funds, as well as publicly traded telecommunications companies. Such institutions, all of which have fiduciary obligations to their shareholders and investors, would never finance a business whose strategy was (as the FCC hypothesizes) to bid aggressively and rely on the

---

FCC conducted a reauction of other C-Block licenses in April 1999, yet made no effort to include NextWave's licenses in that auction. Canceling NextWave's licenses when it had substantially built out its facilities and then reassigning the licenses to existing wireless giants is hardly calculated to speed competitive services to the public.

[27] Petitioners invoke § 309(j)(6), which states that nothing in the "use of competitive bidding" shall "diminish the authority of the Commission . . . to regulate or reclaim spectrum licenses." *See* FCC Br. 47-48; Arctic Slope Br. 24. But the FCC has *never* had authority to "regulate or reclaim spectrum licenses" in violation of § 525. The adoption of competitive bidding did nothing to change that fact, and thus the application of § 525 in this context does not "diminish" any authority that the FCC otherwise possessed or convey any rights that licensees did not otherwise have. *Cf. Kokoszka v. Belford*, 417 U.S. 642, 650-52 (1974) (finding that the Consumer Protection Act was enacted against the background of the Bankruptcy Act and did not alter the protections of bankruptcy).

Bankruptcy Code to save it from the consequences of insolvency.[28]

In all events, relevant provisions of the Bankruptcy Code (which Petitioners ignore) eliminate any incentive for "insincere" bidding. If the value of a bankrupt licensee's spectrum exceeds its debt to the FCC, the licensee will not be able to confirm a plan of reorganization unless the FCC receives full payment (with interest) on its claims. 11 U.S.C. § 506(a), (b); *id.* § 1129(a)(8), (b)(2)(A). In such situations, a licensee has nothing to gain *vis-à-vis* the FCC from having declared bankruptcy. By the same token, if the value of the licensee's spectrum is less than the licensee's debt (and the FCC is thus undersecured), the licensee's investors will risk losing their entire interest if the FCC is not paid in full. *See 203 N. LaSalle*, 526 U.S. at 441-42, 449-58 (explaining operation of "cramdown" provisions, bifurcation of secured claims, and "absolute priority rule"). In other words, if the FCC does not receive payment in full, the original owners of the debtor will be stripped of any exclusive right to retain property, and may lose the right to participate in the reorganized entity at all.[29] Thus, the licensee's owners cannot benefit in the way the FCC posits under any set of circumstances.

---

[28] Concerns over gamesmanship are particularly misplaced here, where the government has testified to the absence of any such activity by NextWave. *See Joint Hearing Before the Subcomm. on Commercial and Admin. Law and the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 107th Cong. 33 (Dec. 6, 2001) (statement of John A. Rogovin, Acting FCC General Counsel) ("I have no evidence of any party to the negotiation gaming the system in any way."); *id.* (statement of Jody Hunt) (testifying that "the Department of Justice has no information or evidence at all that anybody was gaming the system").

[29] In *203 North LaSalle*, this Court declined to decide whether the old equity holders are absolutely precluded from obtaining any stake in the reorganized debtor when some dissenting unsecured creditors are not paid in full. 526 U.S. at 451-54. The Court held, however, that to the extent old equity might be able to obtain an interest through new investment, such investment must be subject competing bids or plans. *Id.* at 454-58.

Moreover, in situations where the FCC might be undersecured, Congress has provided additional protections for secured creditors to deal with risk-shifting when the value of their collateral is volatile. For example, under § 1111(b) a secured creditor such as the FCC can make an election requiring the debtor to pay, over time, the principal amount of the underlying debt if the debtor wishes to keep the asset. *See* 11 U.S.C. § 1111(b)(2); 7 Collier ¶¶ 111.03[4], 1111.03[6][b], at 1111-31 to -32, 1111-37. In addition, Congress has provided priority status to the claims of some government agencies, *see, e.g.*, 11 U.S.C. § 507(a)(8), (a)(9), but has not done so for the FCC. If the FCC believes it deserves more favorable treatment than Congress has given it, its remedy is with that body.[30]

c. The Bankruptcy Code also leaves the FCC with a host of practical measures it could take to pursue the statutory goal of ensuring "rapid deployment" of spectrum while electing to use an installment payment system. *Cf.* FCC Br. 25 (citing § 309(j)(3)(A), (4)(A)). Section 525 prohibits the FCC from canceling licenses only when cancellation automatically follows from the debtor's bankruptcy, insolvency, or non-payment of a dischargeable debt. *Supra* pp. 24-28. Section 525 says nothing about license conditions that are unrelated to financial obligations or the declaration of bank-

---

[30] Nor does the possibility of an avoidance claim under 11 U.S.C. §§ 544 or 548 facilitate insincere bidding. Although an avoidance claim succeeded in *GWI*, all courts agree that the validity of such a claim depends on the interpretation of FCC regulations that determine when a bidder's payment obligation arises. *See* Pet. App. 240a-241a, 247a; *GWI*, 230 F.3d at 806. By promulgating regulations that *clearly* provide that payment obligations vest when the auction closes – as the FCC previously failed to do, but now has done – the FCC can fully protect itself. *See Kovacs*, 469 U.S. at 286 (O'Connor, J., concurring) (rejecting government's effort to overcome plain language of the Code in light of the government's ability to protect its interest in future cases).

ruptcy. Thus, to encourage rapid deployment and prevent warehousing of spectrum, the FCC can impose construction deadlines that are more rigorous or more frequent than the five-year initial construction deadline that the FCC actually adopted. *See* 47 C.F.R. § 24.203; 47 U.S.C. § 309(j)(4)(B). Further, as the D.C. Circuit recognized, § 525 permits the FCC to adopt a variety of measures to advance its regulatory interests, including "requiring winning bidders to obtain third party guarantees for their license fee obligations," Pet. App. 50a, a solution Congress itself proposed, 47 U.S.C. § 309(j)(4)(A) (FCC must consider "*guaranteed* installment payments") (emphasis added); helping bidders obtain loans privately, as the Small Business Administration often does, *see* 15 U.S.C. § 636(a); or requiring larger up front payments. *See* Pet. App. 50a (listing numerous options).

Forsaking these practical alternatives, the FCC chose instead to make non-payment by a debtor in bankruptcy the sole trigger for revocation. This case amply demonstrates that allowing the FCC to do that would give the FCC free reign to plunder the estate, advance its own interests to the detriment of debtors and other creditors, upset the careful policy decisions Congress made in the Code, and derail the reorganization of precisely the sort of business that Congress expressly sought to foster in the Communications Act. NextWave was ready in January 2000 and again in August 2001 to pay all creditors in full and emerge from bankruptcy to compete in the wireless market. It stands ready to do so today. That is precisely the result that Congress intended when it adopted § 525.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

THOMAS G. HUNGAR
DOUGLAS R. COX
MIGUEL A. ESTRADA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

G. ERIC BRUNSTAD, JR.
BINGHAM DANA LLP
One State Street
Hartford, CT 06103
(860) 240-2700

DEBORAH L. SCHRIER-RAPE
SCHRIER-RAPE, P.C.
5929 Westgrove Drive
Dallas, TX 75248
(972) 818-6761

DONALD B. VERRILLI, JR.
Counsel of Record
IAN HEATH GERSHENGORN
WILLIAM M. HOHENGARTEN
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Suite 1200 South
Washington, DC 20005
(202) 639-6000

FRANK A. CASSOU
MICHAEL WACK
NEXTWAVE TELECOM INC.
601 Thirteenth Street, N.W.
Suite 320 North
Washington, DC 20005
(202) 661-2082

Counsel for Respondents

June 21, 2002

APPENDIX A

STATUTORY PROVISIONS INVOLVED

11 U.S.C.A. § 101

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY

§ 101. Definitions

In this title--

* * * *

(5) "claim" means--

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

* * * *

(12) "debt" means liability on a claim;

* * * *

11 U.S.C.A. § 362

See Pet. App. 417a-426a

11 U.S.C.A. § 506

§ 506. Determination of secured status

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

* * * *

11 U.S.C.A. § 525

§ 525. Protection against discriminatory treatment

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making

appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

* * * *

11 U.S.C.A. § 1111

§ 1111. Claims and interests

(a) A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

(b)(1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim,

whether or not such holder has such recourse, unless--

(i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

(ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

(B) A class of claims may not elect application of paragraph (2) of this subsection if--

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.

(2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

11 U.S.C.A. § 1123

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall--

* * * *

(5) provide adequate means for the plan's implementation, such as--

* * * *

(G) curing or waiving of any default;

* * * *

11 U.S.C.A. § 1124

§ 1124. Impairment of claims or interests

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan--

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default--

(A) cures any such default that occurred before

or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title;

(B) reinstates the maturity of such claim or interest as such maturity existed before such default;

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law; and

(D) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

[(3) Repealed. Pub. L. No. 103-394, Title II, § 213(d)(3), Oct. 22, 1994, 108 Stat. 4126]

11 U.S.C.A. § 1126

§ 1126. Acceptance of plan

* * * *

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

* * * *

11 U.S.C.A. § 1129

§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in,

such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests--

(A) each holder of a claim or interest of such class--

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the

plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests--

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that--

(A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive--

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan,

cash on the effective date of the plan equal to the allowed amount of such claim; and

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection

(e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides--

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value

of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims-

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

(C) With respect to a class of interests--

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed

amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

* * * *

11 U.S.C.A. § 1141

§ 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not th e claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of

creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan--

> (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not--
>
> > (i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;
> >
> > (ii) such claim is allowed under section 502 of this title; or
> >
> > (iii) the holder of such claim has accepted the plan; and
>
> (B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if--

> (A) the plan provides for the liquidation of all or substantially all of the property of the estate;

> (B) the debtor does not engage in business after consummation of the plan; and
>
> (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

28 U.S.C.A. § 157

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to-

* * * *

(I) determinations as to the dischargeability of

particular debts;

(J) objections to discharges;

* * * *

(L) confirmations of plans;

* * * *

28 U.S.C.A. § 1334

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

* * * *

47 U.S.C.A. § 309

See Pet. App. 448a-469a

(14) (11)

Nos. 01-653 & 01-657

Supreme Court, U.S.
FILED
AUG 12 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,

Respondents.

ARCTIC SLOPE REGIONAL CORPORATION,
COUNCIL TREE COMMUNICATIONS, LLC, AND
VOICESTREAM WIRELESS CORPORATION,

Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONERS ARCTIC SLOPE REGIONAL CORPORATION, COUNCIL TREE COMMUNICATIONS, LLC, AND VOICESTREAM WIRELESS CORPORATION

MICHELE C. FARQUHAR
JONATHAN S. FRANKLIN*
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

25 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE CANCELLATION OF NEXTWAVE'S LICENSES DID NOT VIOLATE SECTION 525	2
A. NextWave's Licenses Were Not Canceled "Solely Because" of Prohibited Pecuniary Motives	2
B. NextWave's Licenses Were Not Canceled Solely Because Of Its Failure to Pay a "Debt That is Dischargeable in the Case Under This Title"	9
II. THE DECISION BELOW IS INCONSISTENT WITH THE STRUCTURE OF THE BANKRUPTCY CODE	12
III. THE DECISION BELOW IS INCONSISTENT WITH THE COMMUNICATIONS ACT AND DISSERVES THE PUBLIC INTEREST	15
IV. THE COURT NEED NOT REACH NEXTWAVE'S ERRONEOUS "RIGHT TO CURE" ARGUMENT	18
CONCLUSION	20

Petitioners' Rule 29.6 Statement appears at Pet. Br. ii.

TABLE OF AUTHORITIES

Page

CASES:

City of Jamestown v. *James Cable Partners (In re James Cable Partners)*, 27 F.3d 534 (11th Cir. 1994) 12

FCC v. *WOKO, Inc.*, 329 U.S. 223 (1946) 15

Gustafson v. *Alloyd Co.*, 513 U.S. 561 (1995)..... 14

Harris Trust & Sav. Bank v. *Salomon Smith Barney Inc.*, 530 U.S. 238 (2000) 10

In re Chateaugay Corp., 155 B.R. 625 (Bankr. S.D.N.Y. 1993), *aff'd*, 89 F.3d 942 (2d Cir. 1996) 19

In re Crime Free Inc., 196 B.R. 116 (Bankr. E.D. Ark. 1996)..... 19

In re Stewart Foods, Inc., 64 F.3d 141 (4th Cir. 1995) 11-12

In re West Elecs. Inc., 852 F.2d 79 (3d Cir. 1988) 12

Kesler v. *Department of Public Safety*, 369 U.S. 153 (1962)..... 6

Matsushita Elec. Indus. Co. v. *Epstein*, 516 U.S. 367 (1996)..... 18

Midlantic Nat'l Bank v. *DeSeno (In re DeSeno)*, 17 F.3d 642 (3d Cir. 1994) 19

Midlantic Nat'l Bank v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494 (1986)..... 10

NCAA v. *Smith*, 525 U.S. 459 (1999)..... 18

Ohio v. *Kovacs*, 469 U.S. 274 (1985) 9, 10, 14

Pennsylvania Dep't of Public Welfare v. *Davenport*, 495 U.S. 552 (1990)..... 9, 14, 15

Perez v. *Campbell*, 402 U.S. 637 (1971) 5, 6

TABLE OF AUTHORITIES—Continued

Page

Perlman v. *Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747 (9th Cir. 1999) 12

Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989)..... 4

Reitz v. *Mealey*, 314 U.S. 33 (1941) 6

Solid Waste Agency of N. Cook Cty. v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001)..... 8

Terry v. *Reno*, 101 F.3d 1412 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997)..... 3

United States v. *Monsanto*, 491 U.S. 600 (1989)..... 8

Wisconsin v. *Mitchell*, 508 U.S. 476 (1993) 3

STATUTES:

7 U.S.C. § 204 4

7 U.S.C. § 499d(a)..... 4

7 U.S.C. § 499d(e)..... 4

11 U.S.C. § 362(a)(3)..... 13

11 U.S.C. § 362(a)(5)..... 12

11 U.S.C. § 362(b)(4)..... 12, 13

11 U.S.C. § 365 11

11 U.S.C. § 365(c)(1)(a)..... 12

11 U.S.C. § 525 ..... *passim*

11 U.S.C. § 1123 18

11 U.S.C. § 1123(a)(5)(G) 19

11 U.S.C. § 1124 18

11 U.S.C. § 1124(2)(A)..... 19

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 2000e-2(a)(1)	3
47 U.S.C. § 309(a)	1
47 U.S.C. § 309(j)(3)(A)	17
47 U.S.C. § 309(j)(3)(D)	17
47 U.S.C. § 309(j)(7)(B)	5
ADMINISTRATIVE PROCEEDINGS:	
In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order & Further Notice of Rulemaking, 12 F.C.C.R. 16436 (1997)	7
In re Implementation of Section 309(j) of the Communications Act, Second Report & Order, 9 F.C.C.R. 2348 (1994)	16
In re Lakeland PCS LLC, Second Order on Reconsideration, 15 F.C.C.R. 23733 (WTB 2000)	7
REGULATIONS:	
47 C.F.R. § 1.2110(e)(4)(iii) (1997)	14
47 C.F.R. § 1.925(b)(3)(i)	7
LEGISLATIVE MATERIALS:	
123 Cong. Rec. 35,673 (1977)	6
145 Cong. Rec. S14104 (daily ed. Nov. 5, 1999)	8
H.R. Rep. No. 95-595 (1978)	5, 6, 18
S. Rep. No. 95-989 (1978)	5, 6

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

and

ARCTIC SLOPE REGIONAL CORPORATION, *et al.*,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS ARCTIC SLOPE REGIONAL CORPORATION, *et al.*

Nowhere in the voluminous briefing of NextWave and its amici is there any discussion of the *public* interest in the allocation of the spectrum licenses at issue. Instead, NextWave focuses only on its own interest in reaping a perceived windfall in order to solve its financial woes, all the while seeking to blame the FCC for those problems and its inability yet to provide service to a single customer with the spectrum.

It is not surprising NextWave disregards the public interest. The electromagnetic spectrum is a scarce and valuable *public* resource that no one may use unless the FCC determines that the "public interest, convenience, and necessity will be served." 47 U.S.C. § 309(a). Exercising this statutory responsibility, the FCC determined that NextWave's contin-

ued hold on exclusive licenses is *not* in the public interest, and NextWave does not challenge that determination. Contrary to NextWave's arguments, however, Section 525 of the Bankruptcy Code does not override this regulatory determination. Consistent with other provisions of the Code that enable government agencies to fulfill their duties to protect the public, Section 525 prohibits license cancellation only where the action is taken "solely" for certain pecuniary reasons and not where, as here, the action furthers valid regulatory concerns. Neither NextWave nor its creditors had any valid expectation that NextWave would be able to keep its licenses without meeting its regulatory obligations, and thereby tie up a scarce public resource that the FCC has determined should be available to others.

I. THE CANCELLATION OF NEXTWAVE'S LICENSES DID NOT VIOLATE SECTION 525.

A. NextWave's Licenses Were Not Canceled "Solely Because" of Prohibited Pecuniary Motives.

NextWave's constant refrain that petitioners seek a "regulatory exception" to Section 525 is a red herring. *See, e.g.*, Br. 16, 19, 25, 34, 40. We seek only to enforce the statute as written. Section 525 provides that a government agency may not cancel a license "solely because" a debtor has failed to pay a debt dischargeable in its bankruptcy case. Thus, by its plain terms, the statute does not prevent an agency from canceling a license for additional reasons *other* than the mere fact that a debtor has failed to pay a dischargeable debt. NextWave ignores the significance of Congress's use of the words "solely because," which are fatal to its case.

NextWave does not dispute that the FCC had a valid regulatory reason for canceling its licenses—its determination that NextWave "was not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." Pet. App. 234a (Second Circuit opinion); *see id.* at 79a-83a. Instead, NextWave argues that

the FCC's regulatory reason is "irrelevant" under Section 525 because the statute "says nothing about the underlying purpose or motive" of the government agency. Br. 2, 25-26. But the statute most surely does. In prohibiting cancellation of a license solely "because" of one of the factors enumerated therein, Section 525—like other anti-discrimination provisions—plainly speaks in terms of reasons or motives.[1] Given that the FCC had an indisputably valid regulatory reason for canceling NextWave's licenses—the protection of the public interest—the cancellation did not violate Section 525.

A brief filed by a lobbying group and a handful of Congressmen relies on Title VII cases to argue that Section 525 addresses only "causation" and has nothing to do with "motive." Br. for Sen. Leahy *et al.* 23-24. *See also* NextWave Br. 25 (arguing that Section 525 is violated whenever "the sole cause for [cancellation] is one of three specified triggers"). Not so. As even these amici note, Br. 24 n.8, under Title VII an action taken "because of" both a proscribed reason and another one is called the "mixed *motives*" situation. In fact, the analogy to Title VII supports our point, not NextWave's. Title VII bars any action taken "because of" an invidious ground such as race, 42 U.S.C. § 2000e-2(a)(1), and thus reaches any situation where such a ground is even one of many motivating factors. Section 525, by contrast, reaches only actions taken "*solely* because" of a prohibited reason. The distinction is highly significant, particularly given the differences between the invidious discrimination

---

[1] *See Wisconsin* v. *Mitchell*, 508 U.S. 476, 482, 487 (1993) ("motive" played same role under statute that "punish[ed] the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection" as it does under anti-discrimination laws) (quotation omitted; emphases in original); *Terry* v. *Reno*, 101 F.3d 1412, 1420 (D.C. Cir. 1996) (statute's prohibition of conduct "because" of certain events is its "motive requirement"), *cert. denied*, 520 U.S. 1264 (1997); *see also* Arctic Slope Br. 26.

prohibited by Title VII and the financial considerations addressed by Section 525: "the words 'because of' do not mean '*solely* because of.'" *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241 (1989) (plurality; emphasis in original). Here, the statute says "solely because."

Contrary to NextWave's argument (Br. 25-26), allowing the FCC to cancel its licenses for a valid regulatory purpose would not render the exceptions contained in Section 525 superfluous. These exceptions allow the Secretary of Agriculture, as expressly provided by statute, to exclude persons from participation in certain agricultural commodities markets *solely* because such persons have been discharged as bankrupts, regardless of whether the cancellation could also be shown to serve valid regulatory objectives.[2] Unlike these exempted situations, the FCC did not cancel NextWave's licenses based solely on the fact that NextWave had declared bankruptcy, but rather did so because NextWave's failure to make good on its bid signified that it was not the applicant most likely to promote Congress's regulatory objectives.

Nor is it true that an agency can "always articulate *some* regulatory motive" for canceling a license and thereby escape Section 525's prohibitions. NextWave Br. 26. Although agencies may often have valid regulatory reasons for canceling a license when the licensee becomes insolvent, that just shows the relatively narrow scope of Section 525's "solely because" prohibition. As we have noted, however, there are many situations where the cancellation of a license for failure to pay a debt will not necessarily serve valid regulatory

---

[2] *See* 7 U.S.C. § 204 (authorizing automatic termination of trading license upon insolvency); *id.* § 499d(a) ("the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a bankrupt"); *id.* § 499d(e) (authorizing automatic denial of license to anyone who "has, within three years prior to the date of the application, been adjudicated or discharged as a bankrupt").

purposes, as opposed to just the pecuniary interests of the government or a private party. *See* Arctic Slope Br. 27. And as shown in the related context of the regulatory exception to the automatic stay, courts are quite capable of distinguishing between the two situations. *Id.* at 27-28. As the automatic stay cases demonstrate, just because an agency says it is acting for non-pecuniary reasons does not make it so. Here, however, the validity of the FCC's non-pecuniary regulatory concerns is *undisputed*.[3]

That was not so in *Perez* v. *Campbell*, 402 U.S. 637 (1971), which Section 525 was intended to codify. *See* H.R. Rep. No. 95-595 ("House Report"), at 165, 366-367 (1978); S. Rep. No. 95-989 ("Senate Report"), at 81 (1978). Important to the Court's decision was its conclusion that the "sole emphasis" of the statute at issue was "providing leverage for the collection of damages." 402 U.S. at 646.[4] Such pecuni-

---

[3] The attempts by NextWave to paint the FCC as concerned only about making money for the Treasury, *see, e.g.*, NextWave Br. 1-2, 10, 37, 50, are thus immaterial because NextWave does not dispute the validity of the FCC's regulatory concerns. Indeed, although the FCC is statutorily prohibited from basing licensing decisions solely or predominantly on the expectation of Federal revenues, 47 U.S.C. § 309(j)(7)(B), NextWave has not challenged the FCC's action on this ground. But in any event, the FCC promptly sought to enforce its cancellation rule upon the Second Circuit's reversal of the bankruptcy court's erroneous ruling that NextWave could keep its licenses for a mere fraction of its bid.

[4] Contrary to NextWave's contention, Br. 28-29, the Arizona statute at issue in *Perez* discriminated against debtors by specifically providing that "[a] discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the [statute's] requirements." 402 U.S. at 642 (quotation omitted). By contrast, the FCC's rules apply evenhandedly to all persons who fail to abide by them and in no way discriminate against debtors. Although NextWave argues that "[t]o 'discriminate' is but one of nine separate and independently operative prohibitions listed in § 525(a)," Br. 28, Congress in fact viewed all

ary debt collection motives are plainly not the "sole emphasis" of the FCC's actions. Rather, the FCC has shown no interest in collecting NextWave's debt, focusing instead on its regulatory goal of getting the licenses into the hands of companies able to further statutorily-mandated objectives.[5]

The FCC's action thus was not an impermissible "automatic reaction" to NextWave's bankruptcy. NextWave Br. 27 (quoting House Report at 165). The cited legislative history, like the statute, evinces an intent to prevent agencies from "automatically deny[ing] certain licenses to an individual *solely* on the basis of a bankruptcy." House Report at 165 (emphasis added). But it also makes clear that Congress intended to leave government entities free "to pursue appropriate regulatory policies and take appropriate actions." *Id.*; *see also* 123 Cong. Rec. 35,673 (1977) ("it was never the intention of the Judiciary Committee to interfere with legitimate regulatory objectives") (Rep. Butler). Indeed, "an examination into the circumstances surrounding the bankruptcy" is particularly appropriate where, as here, "the causes of a bankruptcy are intimately connected with the license." House Report at 165.

---

such actions as "various forms of discrimination against former bankrupts." House Report at 367; Senate Report at 81.

[5] We do not seek to "resurrect" the approach of cases criticized in *Perez*. *See* NextWave Br. 27 (citing *Kesler* v. *Department of Public Safety*, 369 U.S. 153 (1962), and *Reitz* v. *Mealey*, 314 U.S. 33 (1941)). The *Perez* Court distinguished those cases because the "declared purpose" of the Arizona law, unlike those in *Kesler* and *Reitz*, was the collection of discharged debts. 402 U.S. at 654. No such purpose (or effect) is present here. Nor do we argue that a governmental entity can avoid Section 525 simply by declaring a regulatory purpose other than debt collection—the other ground upon which *Perez* criticized the earlier cases. *Id.* at 651-652. As noted, under Section 525 a court must ascertain that a governmental action serves valid regulatory goals where that issue is joined.

The FCC's decision to enforce its cancellation rule in this case was not an automatic reaction based "solely" on NextWave's bankruptcy, but rather was predicated on valid, non-pecuniary regulatory policies formulated after thorough deliberations. When NextWave and other C-Block licensees encountered financial difficulties, the FCC conducted lengthy proceedings to determine whether to relieve them of their payment obligations. After temporarily suspending those obligations—and thus preventing licenses from automatically canceling—the FCC offered restructuring options that allowed licensees to surrender some or all of their licenses for full or partial forgiveness of their debt. *See* Arctic Slope Br. 11 n.1. Many troubled licensees availed themselves of these options. Upon careful consideration, however, the FCC declined to allow licensees to keep all their licenses for less than their bids, because to do so would "gravely undermine the credibility and integrity" of the auction process. *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order & Further Notice of Rulemaking*, 12 F.C.C.R. 16436, ¶ 19 (1997).

Even so, the FCC still has the discretion to waive any rule in any particular case, upon a showing that "[t]he underlying purpose of the rule(s) would not be served," and that "a grant of the requested waiver would be in the public interest." 47 C.F.R. § 1.925(b)(3)(i). *See In re Lakeland PCS LLC, Second Order on Reconsideration*, 15 F.C.C.R. 23733 (WTB 2000) (finding constructive waiver of timely payment rule). Requests to waive the cancellation rule at issue here, timely filed by licensees *prior* to default, are pending. *See, e.g.*, Airadigm Br. 4. One of these licensees now argues strenuously that the FCC ought to exercise its discretion to waive its on-time payment rule in various circumstances. *Id.* at 4, 28-29. But whatever the merits of this argument, it is for the FCC, not a bankruptcy judge, to resolve.

Unlike these other licensees, though, NextWave has *never* sought a waiver of the FCC's rule. Instead, it tried to exempt itself through bankruptcy. It first convinced a bankruptcy judge to reduce its winning auction bid by nearly 80%. Then, when that strategy failed and another one better suited its financial interests, it belatedly stated it would pay full price. Yet notwithstanding all these attempts to circumvent FCC regulations, the agency still entertained NextWave's request for a retroactive exemption from the cancellation rule. After carefully considering all the circumstances, the FCC denied the request, ruling that the *public* interest outweighed NextWave's private financial interests. Pet. App. 80a.

In sum, Section 525 does not prohibit the cancellation of a license where the sole "trigger" is the failure to pay a dischargeable debt. It prohibits cancellation "solely because" a debtor has failed to pay a dischargeable debt. If an agency has other legitimate reasons for cancellation, Section 525 is not violated simply because the agency would not have cancelled the license "but for" the debtor's failure to pay. Here, it is undisputed that the FCC had such valid regulatory concerns, and Section 525 thus does not apply.[6]

---

[6] NextWave's reliance on unenacted legislative proposals is unavailing. *See* Br. 19 n.12; *see also* Creditor Br. 8-9; Br. for Sen. Leahy *et al.* 14-15. As this Court has oft repeated, "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute," because "[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of N. Cook Cty.* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 169-170 (2001) (quotations omitted). That is especially true here, where the proposed legislation would have exempted the FCC from the *entire* Bankruptcy Code, not just Section 525. *See* 145 Cong. Rec. S14104 (daily ed. Nov. 5, 1999); NextWave Br. 19 n.12. Moreover, whatever the current opinions of a handful of members of Congress, such "postenactment views form a hazardous basis for inferring the intent behind a statute." *United States* v. *Monsanto*, 491 U.S. 600, 610 (1989) (quotation omitted).

B. NextWave's Licenses Were Not Canceled Solely Because Of Its Failure to Pay a "Debt That is Dischargeable in the Case Under This Title."

1. As we have shown (Arctic Slope Br. 28-33), the FCC did not violate Section 525 for an additional, related reason. NextWave's payment obligations were express regulatory conditions on its right to hold its licenses. As such, they are not debts that are dischargeable "in the case under this title," 11 U.S.C. § 525(a), because bankruptcy courts have no authority to review, much less modify, FCC regulations and because *no* court has the authority to grant a party a license contrary to a legitimate FCC regulatory determination that such a grant would not serve the public interest.

Without seriously disputing these propositions, NextWave argues (Br. 33) that it is entitled to retain its licenses without *ever* paying for them because its debt might eventually be discharged in bankruptcy. But NextWave fails to explain how a bankruptcy court could excuse payment in this manner without impermissibly treading on the regulatory authority of the FCC. As the Second Circuit correctly held, the bankruptcy court could not. Thus, the regulatory payment condition that prompted the cancellation was clearly not a "debt that is dischargeable" in NextWave's bankruptcy case, and the cancellation did not violate Section 525.

Rather than explain how a bankruptcy court's modification of an FCC regulatory condition can be reconciled with the FCC's exclusive licensing authority, NextWave contends that this Court's decisions in *Pennsylvania Dep't of Public Welfare* v. *Davenport*, 495 U.S. 552 (1990), and *Ohio* v. *Kovacs*, 469 U.S. 274 (1985), foreclose petitioners' argument. *See* Br. 21. Those cases, however, considered only whether certain obligations were "debts" under the Code, not whether express regulatory conditions were "dischargeable" in a bankruptcy case. Indeed, in *Kovacs*, this Court took pains to emphasize that its decision was not intended to

prevent government entities from enforcing truly *regulatory* requirements that protect the public. *See id.* at 284-285 ("[W]e do not hold that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State's waters is dischargeable in bankruptcy * * *.").[7]

2. Moreover, and in any event, NextWave does not even attempt to refute our alternative submission that its debt is not dischargeable within the meaning of Section 525 because (1) the relationship between NextWave and the FCC—to the extent considered an ordinary commercial arrangement—was executory in nature and (2) executory obligations, regardless of whether assumed or rejected, are not dischargeable debts. *See* Arctic Slope Br. 30-31. NextWave's failure to respond underscores the correctness of the argument, the premises of which NextWave has previously conceded.[8]

Neither NextWave nor its amici refute the proposition that the commercial relationship between NextWave and the FCC, like the relationship between any licensor and licensee,

---

[7] *See also id.* at 283 n.11 (distinguishing case holding that injunction to comply with environmental laws was exempt from automatic stay because that case involved "an effort to enforce the police power statutes of the State, not a suit to enforce a money judgment"); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 502 (1986) (relying on *Kovacs* to hold that Bankruptcy Code does not permit trustee to abandon contaminated land in contravention of regulatory clean-up order).

[8] NextWave wrongly asserts (Br. 35 n.23) that this point has been waived. It is raised in support of the broader argument that NextWave's payment obligations were not dischargeable within the meaning of Section 525—an issue both presented and passed on below. *See* Pet. App. 41a-44a. Once an issue is properly presented, a party can make any argument in support of its position. *See Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 245-246 n.2 (2000) ("[P]arties are not limited to the precise arguments they made below.") (quotation omitted).

is executory in nature. *See* Arctic Slope Br. 30.[9] Under Section 365 of the Code, 11 U.S.C. § 365, a debtor must either "assume" or "reject" an executory contract. As NextWave has noted, if the debtor is permitted to assume the contract, the resulting obligation is a *post*-petition debt and thus not "dischargeable" in bankruptcy. *See* Pet. Opp. 17-18 & n.8. Likewise, if the debtor rejects the contract—as NextWave would be required to do here, *see* Arctic Slope Br. 31 n.8—the other party (here, the FCC) is *released* from performance and has a claim, not for the underlying debt itself, but for damages. *See* Pet. Opp. 18. Contrary to NextWave's attempt to disavow its own words, *see* NextWave Br. 36 n.23, it has clearly stated that "[t]he sums owed on account of a post-assumption default * * * would not be dischargeable," and that if an executory license were rejected "the FCC would have no obligation to perform its side of the contract by granting the licenses * * *." Pet. Opp. 18 & n.8.

Thus, whether the debtor assumes or rejects an executory contract, the underlying debt is nondischargeable. Although the Court need not reach this argument given the other reasons why Section 525 does not apply, even under NextWave's *own* view of the law the FCC's cancellation of NextWave's licenses would not violate the statute.[10]

---

[9] Contrary to NextWave's misreading of our opening brief, NextWave Br. 35 n.23, we expressly argued that NextWave's license obligations, to the extent commercial in nature, are executory. *See* Arctic Slope Br. 30 ("the relationship between NextWave and the FCC is plainly executory").

[10] NextWave erroneously contends that considering this argument would require the Court to address circuit splits. Br. 36 n.23. NextWave cites *no* case holding that payment obligations under executory contracts are dischargeable debts either generally or under Section 525. *See id.* (citing *In re Stewart Foods, Inc.*, 64 F.3d 141, 144, 145 n.2 (4th Cir. 1995) (noting that damages from the rejection of an executory contract "are treated as a pre-petition claim," and that "[w]hen a debtor-in-possession assumes an execu-

II. THE DECISION BELOW IS INCONSISTENT WITH THE STRUCTURE OF THE BANKRUPTCY CODE.

NextWave's constant refrain is that the FCC is acting as an ordinary creditor when it seeks to reallocate NextWave's spectrum licenses in the public interest, and that Section 525 must be interpreted according to the general purpose of the Code, which NextWave says is to allow NextWave "breathing space" from such actions. *See*, *e.g.*, NextWave Br. 34, 36. NextWave's creditors likewise argue that they necessarily relied on this understanding in lending to and investing in NextWave. *See* Creditor Br. 4.

In fact, the Code specifically recognizes that a government agency acting pursuant to its regulatory powers is not just like an ordinary creditor, and that debtors are *not* entitled to any "breathing space" from such actions. The Code exempts from the automatic stay any action by a government entity to enforce its "regulatory power." 11 U.S.C. § 362(b)(4). As the Second Circuit held, the FCC's cancellation of NextWave's licenses falls within that exemption because the FCC was "[u]ndoubtedly * * * a governmental unit that is seeking 'to enforce' its 'regulatory power.'" Pet. App. 125a.[11] And even under NextWave's *own* interpretation of

---

tory contract, the contract becomes a post-petition arrangement")). And while the plain language of Section 365(c)(1)(a) requires that NextWave must reject its executory licenses because applicable law bars their assignment, *see Perlman* v. *Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747 (9th Cir. 1999); *City of Jamestown* v. *James Cable Partners (In re James Cable Partners)*, 27 F.3d 534, 537 (11th Cir. 1994); *In re West Elecs. Inc.*, 852 F.2d 79, 83 (3d Cir. 1988), that issue need not be resolved here because, as noted, Section 525 is not violated *regardless* of whether NextWave were to assume or reject its licenses.

[11] NextWave half-heartedly attempts to dispute that holding on the ground that the regulatory exception does not apply to the enforcement of liens. *See* Br. 38-39; 11 U.S.C. § 362(a)(5). The

Section 525, the FCC could automatically cancel its licenses for violation of a multitude of regulatory requirements. *See* NextWave Br. 49-50 ("Section 525 says nothing about license conditions that are unrelated to financial obligations or the declaration of bankruptcy" such as construction deadlines); Creditor Br. 28; Br. for Sen. Leahy *et al.* 28-29. Thus, it is simply not true that Section 525 was intended to "preserve" licenses for the bankruptcy estate under all circumstances. NextWave Br. 36.

This fact disposes of the argument of NextWave's creditors that they somehow relied on NextWave's ability to keep its licenses in bankruptcy, and that "no rational creditor" would ever lend money to a licensee under petitioners' interpretation of Section 525. Creditor Br. 4-5. *See also id.* at 25-26. Even under the interpretation advanced by NextWave and its allies, any person would know that licenses could be revoked in bankruptcy for a variety of regulatory reasons, *regardless* of the effect such cancellation would have on NextWave's creditors or its reorganization prospects.[12] It is likewise

---

attempt fails. The regulatory exception expressly applies to "any act to obtain possession of property of the estate * * * or to exercise control over property of the estate." *Id.* § 362(a)(3). *See id.* § 362(b)(4) (exception applies to actions "under paragraph (1), (2), (3), or (6) of subsection (a)"). That the FCC chose, out of an abundance of caution, to take a security interest in the licenses cannot "un-exempt" its expressly exempted cancellation, particularly given that the FCC has not instituted any action to foreclose on that interest. *See also* Arctic Slope Br. 34 n.10.

[12] Given the FCC's fully-secured status, NextWave's creditors would benefit from the application of Section 525 only if the value of the licenses exceeded NextWave's debt to the FCC after NextWave declared bankruptcy, thereby allowing NextWave to reap a windfall from its alleged insolvency. If, as the creditors now say, they relied on this speculative chain of events in lending or investing money, that is all the more reason to preclude NextWave from gaming the licensing system in this manner.

absurd to suggest that Section 525 had a "well-developed meaning" prohibiting the FCC from enforcing regulatory policies that involve payment conditions, Creditor Br. 17, given that the D.C. Circuit's statutory interpretation was contrary to that of other circuits. *See* Arctic Slope Pet. 17-20. If there was anything NextWave and its creditors should have relied on, it was the FCC's regulations and the licenses themselves, which expressly warned that the licenses would automatically cancel upon failure to make timely payment. *See* 47 C.F.R. § 1.2110(e)(4)(iii) (1997); Pet. App. 388a.

NextWave thus espouses an interpretation of Section 525 at odds with the basic structure of the Code. Like any statute, the Code must be read "as a symmetrical and coherent regulatory scheme." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569 (1995). In the regulatory exception to the automatic stay, Congress provided that a bankruptcy filing should not hinder governments' abilities to effectuate valid regulatory purposes—as opposed to purely pecuniary ones. That was also its expressed intent in enacting the narrow "solely because" prohibition of Section 525. *See supra* at 6. We advance an interpretation in harmony with that intent and structure—one that interprets the narrow prohibition of Section 525 consistently with the corresponding exception to the automatic stay. NextWave, by contrast, advances an inconsistent interpretation that would prevent the FCC from enforcing what is now perhaps the most important indicator of the public interest in spectrum allocation: a licensee's ability and willingness to timely pay what it has bid.

Contrary to NextWave's argument by analogy, Br. 38 & n.24, nothing in *Davenport* or *Kovacs* indicates that Section 525 should be interpreted inconsistently with the regulatory exception to the automatic stay. As noted, those cases addressed whether certain payment obligations were "debts" subject to ordinary bankruptcy rules—not whether a government entity could pursue regulatory actions against a debtor during bankruptcy. The Court noted that discharging those

monetary obligations would not be inconsistent with exceptions to the automatic stay, *see Davenport*, 495 U.S. at 560-561, but at the same time made clear that government entities can take appropriate *regulatory* action during bankruptcy. *See id.* at 561; *supra* at 9-10 & n.7. Unlike the agencies in those cases, the FCC has not sought to collect NextWave's debt, but rather is seeking only to pursue its regulatory responsibilities to allocate spectrum so as to serve the public interest and Congress's objectives.

III. THE DECISION BELOW IS INCONSISTENT WITH THE COMMUNICATIONS ACT AND DISSERVES THE PUBLIC INTEREST.

The D.C. Circuit's holding that the Bankruptcy Code forces the FCC to leave licenses in the hands of an entity the agency has determined is not serving the public interest simply cannot be reconciled with Congress's clear intent expressed in the Communications Act that the *FCC*—not individual licensees or bankruptcy courts—have the exclusive authority to allocate licenses in the public interest. *See* Arctic Slope Br. 39-40. NextWave's response—that the D.C. Circuit, not a bankruptcy court, invalidated the FCC's cancellation of its licenses—misses the point. Applying the Bankruptcy *Code*—as bankruptcy courts were specially created to do—so as to prevent the FCC from canceling the licenses of an entity that the agency has determined is not serving the public interest impermissibly interferes with its exclusive regulatory authority. The FCC's exercise of that authority remains subject to review for abuse of discretion by the D.C. Circuit. But the D.C. Circuit, no more than a bankruptcy court, may not apply the Bankruptcy Code so as to usurp the FCC's role as the exclusive arbiter of the public interest in allocating licenses to the Nation's radio spectrum. *See, e.g.*, *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946) ("it is the Commission, not the courts, which must be satisfied that the public interest will be served").

The D.C. Circuit's interpretation of Section 525 also threatens the integrity of the auction process. As the Second Circuit explained, the auction mechanism can achieve "fair and efficient allocation of spectrum licenses * * * only if the bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue." Pet. App. 246a. Attempting to sidestep the issue, NextWave argues that "Congress rejected a policy of allocating licenses based only on 'willingness and ability to pay the most for the license,' " Br. 45, because Congress also authorized small business preferences. But the fact that Congress also sought to advantage small businesses who could make good on their bids does not alter its overarching intent—as discerned by the FCC—to award licenses to "those bidders with the highest willingness to pay." *In re Implementation of Section 309(j) of the Communications Act, Second Report & Order*, 9 F.C.C.R. 2348 ¶ 71 (1994). Indeed, it is perverse for NextWave to argue that its interpretation of Section 525 furthers the goal of small business preferences, *see* NextWave Br. 46, when that interpretation directly caused the FCC to suspend the installment payment program that NextWave says is critical for small business participation. *See* Arctic Slope Br. 42 n.14. And in any event, NextWave does not dispute that even under a cash-up-front regime, its interpretation would require the FCC to *grant* a license to a company that declares bankruptcy after an auction but before payment is due. *See id.* at 42-43.

NextWave nevertheless maintains that retaining its licenses in bankruptcy without paying for them is compatible with Congress's objective to permit small business participation because it "ensur[es] that small businesses without ready capital can obtain breathing room to reorganize." Br. 46. But the ultimate goal of the auction system is to award licenses to those firms that will actually bring needed technologies and services to the public. A bidder's default indicates that it did not submit a realistic bid and was never "the applicant most

likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." Pet. App. 234a.

Allowing an entity that is providing no service to shield licenses in bankruptcy while it seeks to obtain necessary financing it should have had beforehand impedes Congress's goals of promoting "the development and rapid deployment of new technologies, products, and services * * * *without administrative or judicial delays*," and the "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3)(A), (D) (emphasis added). In this case alone, spectrum worth billions has lain fallow for more than five years, while critical shortages of spectrum abound. The ultimate loser, of course, is the public. The pattern advocated by NextWave—where a winning bidder uses bankruptcy to gain "breathing room" to acquire the necessary financing to pay for its licenses—imposes precisely the "judicial delays" (here already lasting years) that Congress sought to avoid. *Id.*

NextWave fails to dispel the specter of gamesmanship and insincere bidding raised by the D.C. Circuit's decision. Preventing the FCC from enforcing its full and timely payment requirement allows applicants to outbid others who submit realistic bids and in fact value the licenses more highly, and then seek to have their payment obligations adjusted in bankruptcy or buy time there speculating that the value of the licenses will increase. NextWave says that firms "would never finance a business whose strategy was * * * to bid aggressively and rely on the Bankruptcy Code to save it from the consequences of insolvency." NextWave Br. 47-48. But its own creditors seem to disagree, as they argue (albeit incorrectly) that they would not have provided any financing unless NextWave could use Section 525 to earn a windfall in the event of bankruptcy. *See supra* at 13-14 & n.12.

NextWave argues (Br. 49-50) that the FCC may base its licensing decisions on any number of regulatory factors *except* the one perhaps most critical to serving the public

interest—a licensee's ability to make good on the amount it represented it could pay. If left to stand, the D.C. Circuit's decision threatens not only to continue to impair the FCC's ability to award licenses in the manner Congress prescribed, but also to prevent hundreds of other federal, state, and local agencies from carrying out important regulatory objectives. *See* Arctic Slope Br. 44. As explained, the statute does not hamstring agencies seeking to carry out valid regulatory policies necessary to protect the public interest. Indeed, the recent spate of major bankruptcies in the telecommunications industry underscores the need for the FCC to be able to ensure continued service and otherwise protect the public. Thus, this Court should reverse the judgment below to ensure that government agencies remain free "to pursue appropriate regulatory policies and take appropriate actions," just as Congress intended. House Report at 165.

IV. THE COURT NEED NOT REACH NEXTWAVE'S ERRONEOUS "RIGHT TO CURE" ARGUMENT.

NextWave argues in the alternative that the FCC is prevented from canceling its licenses under the Code's provisions addressing the curing of defaults. *See* Br. 40. This Court, however, "generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996). *Accord NCAA* v. *Smith*, 525 U.S. 459, 470 (1999). There is no reason to depart from that settled practice here.[13]

But NextWave is mistaken in any event. NextWave argues that even if both Section 525 and the automatic stay permit cancellation of its licenses, the FCC's actions violate NextWave's purported "right" to cure defaults under 11 U.S.C. §§ 1123 and 1124. The argument makes no sense. If

[13] This is plainly an alternative argument to the Section 525 grounds relied upon by the D.C. Circuit, and not just a different theory in support of an argument reached below. *Cf. supra* n.8

neither the automatic stay nor Section 525 prevent the FCC, after NextWave declared bankruptcy, from immediately canceling and reauctioning NextWave's licenses upon its failure to meet its licensing conditions, NextWave cannot have an overarching "right to cure" that would allow it to reacquire the licenses upon plan confirmation. For all the reasons set forth above, the FCC is entitled to enforce its regulatory authority. As such, only the FCC—and not NextWave or a bankruptcy court—is entitled to decide whether NextWave can "cure" its regulatory violation.

The Code provisions cited by NextWave do not restrict the FCC's regulatory authority. Section 1123 provides only that curing defaults is one of several possible means of implementing a bankruptcy plan. *See* 11 U.S.C. § 1123(a)(5)(G) (plan shall "provide adequate means" for its implementation "such as" curing defaults). Thus, it governs the conduct of those proposing plans, not creditors generally or regulators specifically. Similarly, Section 1124 is a basis for determining whether a party is "impaired" under a plan; it does not restrain conduct or confer any rights.[14] Because these cure provisions do not impose duties on third parties, courts uniformly recognize that intervening events may cut off a debtor's ability to cure defaults. *See, e.g., Midlantic Nat'l Bank* v. *DeSeno (In re DeSeno)*, 17 F.3d 642, 644 (3d Cir. 1994) (no right to cure after foreclosure); *In re Crime Free Inc.*, 196 B.R. 116, 117 (Bankr. E.D. Ark. 1996) (same).

The Commission's cancellation and reauction of the spectrum licenses is just such an event. NextWave's default had

[14] *See id.* § 1124(2)(A) ("a class of claims or interests is impaired under a plan" unless, *inter alia*, the plan cures defaults); *see In re Chateaugay Corp.*, 155 B.R. 625, 634 (Bankr. S.D.N.Y. 1993) ("Section 1124 is not a section that provides a right to cure. It merely provides a method to analyze whether an already formed class may be considered unimpaired under a plan of reorganization."), *aff'd*, 89 F.3d 942 (2d Cir. 1996).

more than just financial consequences; it demonstrated that NextWave's exclusive hold on the public airwaves would not serve the public interest. This harm to the public interest cannot be "cured" by a delinquent payment years after the fact. Rather, the FCC must have the authority to reassert control over the spectrum in order to get it into the hands of others who will abide by its regulations.[15]

CONCLUSION

For the foregoing reasons, and those in petitioners' opening brief, the judgment below should be reversed.

Respectfully submitted,

MICHELE C. FARQUHAR
JONATHAN S. FRANKLIN*
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

* Counsel of Record

Counsel for Petitioners

Supreme Court, U.S.
FILED
Aug 19
AUG 19 2002

Nos. 01-653 and 01-657

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.

ARCTIC SLOPE REGIONAL CORPORATION, ET AL., PETITIONERS

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOHN A. ROGOVIN
Acting General Counsel
Federal Communications Commission
Washington, D.C. 20554

TABLE OF CONTENTS

	Page
A. The licenses did not cancel solely because of financial default	2
B. FCC license conditions are not debts that are dischargeable in bankruptcy	8
C. Respondents' construction is contrary to federalism principles and conflicts with the Code's structure	13
Appendix A	1a
Appendix B	7a
Appendix C	8a
Appendix D	11a

TABLE OF AUTHORITIES

Cases:

Bryan v. *Rainwater*, 254 B.R. 273 (Bankr. N.D. Ala. 2000)	12
CFTC v. *Schor*, 478 U.S. 833 (1986)	16
Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)	15
Chevron U.S.A. Inc. v. *Echazabal*, 122 S. Ct. 2045 (2002)	14
City of Columbus v. *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226 (2002)	14
Davenport, In re, 83 B.R. 309 (Bankr. E.D. Pa. 1988)	12
DeSeno, In re, 17 F.3d 642 (3d Cir. 1994)	16
Duffey v. *Dollison*, 734 F.2d 265 (6th Cir. 1984)	11
Farley v. *Nationwide Mut. Ins. Co.*, 197 F.3d 1322 (11th Cir. 1999)	3
Federal's, Inc. v. *Edmonton Inv. Co.*, 555 F.2d 577 (6th Cir. 1977)	11
Gilliam, In re, 67 B.R. 83 (Bankr. M.D. Tenn. 1986)	12

Cases—Continued: Page

Jones v. *Dunkirk Radiator Corp.*, 21 F.3d 18 (2d Cir. 1994) 3
Laracuente v. *Chase Manhattan Bank*, 891 F.2d 17 (1st Cir. 1989) 3
Lebron v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995) 13
National Gypsum, In re, 208 F.3d 498 (5th Cir.), cert. denied, 531 U.S. 871 (2000) 11, 13
Ohio v. *Kovacs*, 469 U.S. 274 (1985) 12
Pennsylvania Dep't of Pub. Welfare v. *Davenport*, 495 U.S. 552 (1990) 12
Perez v. *Campbell*, 402 U.S. 637 (1971) 6, 13
Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989) 3
United States v. *Dyer*, 216 F.3d 568 (7th Cir. 2000) 3
United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 15
United States v. *Vonn*, 122 S. Ct. 1043 (2002) 14-15
WAIT Radio v. *FCC*, 418 F.2d 1153 (D.C. Cir. 1969) 5
Wireless Telecomm., Inc, In re, No. 1-00-02188 (Bankr. M.D. Pa. Jan. 18, 2001) 6

Statutes and regulation:

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
11 U.S.C. 362 18
11 U.S.C. 362(b)(4) 15
11 U.S.C. 525 ..... *passim*
11 U.S.C. 525(a) 16
11 U.S.C. 1123(a)(5)(G) 16
11 U.S.C. 1124(2)(A) 16
11 U.S.C. 1141(d)(1)(A) 9
Communications Act of 1934, 47 U.S.C. 151 *et seq.*:
47 U.S.C. 301 ..... 6, 10
47 U.S.C. 309(j) (1994 & Supp. V 1999) 4, 10, 20

Statutes and regulation—Continued: Page

47 U.S.C. 309(j)(3) (1994 & Supp. V 1999) 6
47 U.S.C. 309(j)(3)(A) 2, 11, 16
47 U.S.C. 309(j)(3)(C) (1994 & Supp. V 1999) 16
47 U.S.C. 309(j)(3)(D) (1994 & Supp. V 1999) 16
47 U.S.C. 309(j)(6)(C) 10
47 U.S.C. 309(j)(7)(B) 18
47 U.S.C. 310(d) 13
47 U.S.C. 402 9
Hobbs Act, 28 U.S.C. 2341 9
41 U.S.C. 15 13
47 C.F.R. 1.925(b)(3) 5

Miscellaneous:

Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, In re:
12 FCC Rcd 16,436 (1997) 4, 16
13 FCC Rcd 8345 (1998) 4
3 *Collier on Bankruptcy* (2002) 13
123 Cong. Rec. (1977):
p. 35,671 3
p. 35,673 14
145 Cong. Rec. (daily ed.):
pp. H12,741-H12,742 (Nov. 18, 1999) 16
p. S9419 (July 27, 1999) 15
p. S9434 (July 27, 1999) 15
V. Countryman, *Executory Contracts in Bankruptcy*, 58 Minn. L. Rev. 479 (1974) 11-12, 13
H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) 14
H.R. Rep. No. 111, 103d Cong., 1st Sess. (1993) 18
H.R. Rep. No. 149, 105th Cong., 1st Sess. (1997) 16

REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

Respondents do not deny breaching the payment condition of their licenses—the condition most critical to their selection over competing applicants to use scarce spectrum in the public interest. Nor do they dispute that they failed to employ the spectrum for any purpose or to provide service to a single customer for the past five years. And they do not seriously contest the FCC's determination that allowing respondents to retain the licenses, as opposed to re-auctioning them, would injure the public interest and hinder Congress's goal of awarding licenses to those who value spectrum most highly and will put it to the most rapid and intensive use.

Instead, respondents seek to vindicate their own private financial interest by arguing that Section 525 of the Bankruptcy Code allowed them to retain the licenses for years without paying for them, prohibited the FCC from conditioning licenses on timely payment, and barred the FCC from exercising its regulatory authority to cancel the licenses. But Section 525 does not prohibit agencies from *ever* canceling a debtor's licenses. Nor does it grant respondents a right to retain the licenses without paying for them. Instead, Section 525 prohibits agencies from "revok[ing]" licenses "*solely because*" the debtor "has not paid *a debt that is dischargeable*" under the Bankruptcy Code. 11 U.S.C. 525 (emphases added).

To resolve this case, the Court need only interpret Section 525 in accordance with its carefully limited scope. The spectrum licenses here were not revoked "solely because" of financial default. Instead, the FCC's *reason for* canceling the licenses was regulatory, *i.e.*, based on an assessment of the public interest. The FCC, moreover, gave respondents the opportunity to show that the public interest favored allowing them to hold the licenses despite their inability to meet the payment conditions. The FCC thus canceled the licenses not "solely because" respondents failed to pay, but because of that fact *in combination with* respondents' failure

to show that their continued control of the spectrum would promote the public interest. Nor were the licenses canceled because respondents failed to pay a debt "that is dischargeable" in bankruptcy. The full and timely payment condition is a critical regulatory term of FCC licenses. It is not a debt, let alone dischargeable in bankruptcy.

Respondents' contrary construction of Section 525 is at odds with the Bankruptcy Code's structure and the FCC's regulatory authority. The Bankruptcy Code generally avoids intrusion on agency regulatory activities, Gov't Br. 43-47, and 47 U.S.C. 309(j)(3)(A) requires prompt utilization of spectrum "without administrative or judicial delays." Respondents nonetheless argue that Section 525 gave them additional "breathing space" to fulfill regulatory obligations, despite the FCC's determination that further extensions (beyond the one-year hiatus the FCC granted) would harm the public interest. Respondents thus construe Section 525 to impose precisely the extended judicial delays (here, 5 years and counting) that Section 309(j)(3)(A) seeks to avoid. Respondents' construction also strikes at the heart of the auction mechanism, under which the promise to pay is the central consideration in selecting one applicant over all others. As the Second Circuit recognized, the failure to fulfill that promise fatally undermines the licensee's claim that it is the entity best qualified to have exclusive use of limited spectrum resources, and that it is able to put the spectrum to immediate use. Pet. App. 109a, 229a-230a, 235a-236a; Gov't Br. 22-25. Respondents and their amici nowhere explain how the auction system can be reconciled with a regime in which a winning bidder can have its bid altered in bankruptcy, or hoard FCC licenses indefinitely in the hope that the market will eventually support its bid.

A. The Licenses Did Not Cancel Solely Because Of Financial Default

Section 525 does not proscribe license cancellations whenever nonpayment is a "but for" cause of license revocation. See Gov't Br. 36-37; Gov't Pet. 24; Arctic Slope Br. 25. Instead, Section 525 bars license revocation only if it occurs

"solely because" of nonpayment, *i.e.*, where nonpayment is the "'one and only' or 'sole'" motive for revocation, to the *exclusion* of "any other" contributing consideration. *Jones* v. *Dunkirk Radiator Corp.*, 21 F.3d 18, 23 (2d Cir. 1994); *Farley* v. *Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1334 (11th Cir. 1999) (similar).

1. Here, the licenses did not cancel "solely because" respondents failed to pay a dischargeable debt. First, as the Second Circuit explained, cancellation was supported by the FCC's determination that respondents were "not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." Pet. App. 234a. The FCC thus acted for a valid regulatory reason —one that applies whether or not the licensee is in bankruptcy. Contrary to respondents' claim (Br. 25-26), the FCC's "motive" *is* relevant; the phrase "solely because" in Section 525 (an anti-discrimination provision) is most naturally understood as referring to the motive for the agency's action. See Gov't Br. 38-39. The provision's "philosophy" is "to prevent discrimination against a person solely—and I emphasize the word 'solely'—because that person has undergone bankruptcy." 123 Cong. Rec. 35,671 (1977) (Rep. Foley).

Rather than show cancellation "solely because" of financial default, respondents attempt to rewrite Section 525 by excising the word "solely." Revocation was invalid, they repeatedly argue, because nonpayment was (like certain other breaches) a "trigger" for cancellation. Resp. Br. 24, 25, 26, 27 n.16. That shows only but-for causation, "a very weak sense of causation," that is "poles apart from 'sole cause,' as innumerable cases * * * make clear." *United States* v. *Dyer*, 216 F.3d 568, 570 (7th Cir. 2000); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241 (1989) (the words "'because of' do not mean '*solely* because of'"); *Laracuente* v. *Chase Manhattan Bank*, 891 F.2d 17, 23 (1st Cir. 1989).

2. Respondents are also incorrect to claim (Br. 27) that nonpayment was the "sole" cause of cancellation. After respondents indicated that they would be unable to make timely payments as their licenses required, the FCC exam-

ined the specific financial difficulties encountered by respondents and other licensees at their request and issued three *Restructuring Orders* providing relief. See Gov't Br. 7-8, 38-39. In so doing, the FCC *suspended payment obligations* for more than a year. 13 FCC Rcd at 8354 (¶ 24). The FCC considered further delays, but determined that they would harm the public interest. Such delays would undermine auction integrity, impugn the reliability of auction results, and be unfair to unsuccessful bidders who might have bid more if the option of deferral had been announced in advance. 12 FCC Rcd at 16,446-16,447 (¶ 18). Additional "deferral of the C block debt," the FCC also explained, would interfere with "rapid," "efficient and intensive" use of the electromagnetic spectrum, see 47 U.S.C. 309(j), since it remained unclear whether "the long term financial outlook facing many licensees would" ever sufficiently "improve[]" to permit them to use the spectrum to public benefit. 12 FCC Rcd at 16,446-16,447 (¶ 18); 13 FCC Rcd at 8348, 8354 (¶¶ 7, 24). To assist C-Block licensees, the FCC offered several forms of immediate relief, including a program under which they could return individual licenses (or portions thereof) without financial penalty. See 13 FCC Rcd at 8350 (¶¶ 11-15). Manifestly, therefore, license cancellation did not occur "solely because" respondents failed to pay. It occurred in part for that reason. But it also occurred because the FCC, after considering respondents' circumstances, concluded that further relaxation of the regulatory conditions of full and timely payment would injure the public interest.[1]

As amicus Airdigm acknowledges (Br. 28-29), the FCC also has "discretion to waive any of its rules" if it determines that "[t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant

[1] Given the FCC's provision of relief and one-year deferral of payment obligations, respondents clearly err (Br. 27 n.16) in asserting that the FCC's *Restructuring Orders* "merely set forth formally the FCC's motives and purpose for selecting nonpayment" as a basis for license cancellation. The FCC considered further changing the payment condition, but concluded that doing so would harm the public interest.

case, and that a grant of the requested waiver would be in the public interest," particularly "[i]n view of unique or unusual factual circumstances." 47 C.F.R. 1.925(b)(3). See generally *WAIT Radio* v. *FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).[2] Several licensees sought waivers, and some are pending before the FCC. Despite the FCC's warning that bankruptcy would not by itself excuse compliance, see p. 19, *infra*, respondents did not seek such administrative relief. Instead, respondents sought to exempt themselves from FCC rules through bankruptcy—first by obtaining a bankruptcy court order reducing their payment from the $4.7 billion they bid to just over $1 billion, and then by offering to pay in full years later, only after that initial strategy had failed and market factors had changed, such that the licenses were worth $10 billion *more* than respondents' original bid.

Respondents did seek reconsideration of the FCC's decisions, and the FCC concluded that granting a waiver "retroactively" would be "unjustified." Pet. App. 71a. The FCC concluded that "the public interest in maintaining the integrity of * * * auctions, the need to ensure that licenses are allocated to those * * * best qualified to hold them, and" the goal of speeding "competition in the marketplace outweigh NextWave's individual business interests and those of its creditors." *Id.* at 80a. Congress had directed the FCC to "promote the rapid deployment of new technologies, products and services," *id.* at 81a, and to bring them "to the public without undue delay," *id.* at 66a & n.43. Respondents were "providing no service," and had left valuable spectrum "unused" for over three-and-a-half (now five) years. *Id.* at 78a, 82a. That "failure to utilize the spectrum" had "hindered the growth of innovative and competitive telecommunications services," *id.* at 82a, and allowing

[2] The FCC is not required in waiver proceedings to re-examine fundamental regulatory conclusions reached in rulemaking proceedings; nor are waivers lightly granted. But the FCC does entertain waiver requests to address circumstances not previously anticipated if the licensee shows that, under those circumstances, application of the rule will not serve its basic purposes and will harm the public interest.

respondents to continue holding the licenses would "further harm[] the public's interest in the efficient deployment of" such services, *id.* at 83a. Thus, cancellation was a product of respondents' failure to pay, a regulatory determination that further extensions were not in the public interest, *and* a determination that respondents had not shown that a waiver would be in the public interest.[3]

Although the FCC addressed factors beyond timely payment *in the very order under review*—the FCC's *Reconsideration Order*—respondents' only answer is that no "inquiry was made into NextWave's fitness to hold the licenses." Resp. Br. 27 n.16. But *fitness* (*i.e.*, possession of minimal qualifications) is not the legal standard. No source of law limited the FCC to considering fitness, or entitled respondents to retain licenses without payment upon proving minimal qualifications. Rather, the question the FCC considered is whether enforcing the timely payment conditions would serve the *public interest* those conditions were designed to promote. 47 U.S.C. 301, 309(j)(3).

This case is thus wholly unlike *Perez* v. *Campbell*, 402 U.S. 637 (1971), the decision Section 525 codifies. The statute there provided no mechanism by which a driver could prove that the public interest would be served by allowing him to retain his license despite financial default. *Id.* at 646-647. The statute instead had its "sole emphasis" on "providing leverage for the collection of damages from drivers" involved in accidents, *id.* at 646-647, and "protect[ing] judgment creditors from 'financially irresponsible persons.'" *Id.* at 649. The FCC's rules, in contrast, are designed to promote the public interest in rapid, effective and efficient deployment of scarce radio spectrum among competing applicants, not judgment collection. For that reason, the FCC

[3] Respondents imply (Br. 24 n.13) that bankruptcy law precluded them from making payments. Respondents never sought a waiver from the FCC on such grounds, and never sought bankruptcy court authority to make the payments. Besides, other licensees *have obtained* authorization to make payments in bankruptcy. See, *e.g.*, *In re Wireless Telecomm., Inc.*, No. 1-00-02188 (Bankr. M.D. Pa. Jan. 18, 2001). See also Gov't Br. 26.

procedures provided respondents with an opportunity to show that they should hold the licenses (and allowed them to hold the licenses for a year) notwithstanding their inability to make payments, an opportunity that would be wholly out of place in a regime directed primarily toward debt collection.[4]

Ultimately, respondents are deliberately vague about how Section 525 works (or how the FCC should respond) where a licensee is unable to pay for the license. Instead, they rely on the happenstance that, in this case, the market value of the licenses skyrocketed during protracted bankruptcy proceedings. Respondents thus largely ignore the fact that, for years, they disclaimed willingness ever to pay the bid as required by the licenses and that, but for a change in market conditions, they would still be unwilling to pay. Respondents cannot articulate how Section 525 can apply without fundamentally interfering with the FCC's authority. To the extent respondents offer any theory, they imply that the FCC should have instituted a *de novo* public interest inquiry into whether respondents should retain the licenses (precisely the sort of unworkable and inefficient process Congress sought to eliminate by establishing auctions, Gov't Br. 2-3), perhaps with a thumb on the scale in favor of the bankrupt. But Section 525 prohibits agencies from canceling licenses "solely because" of financial default. It does not require agencies to conduct *de novo* hearings or presume that, despite the breach of the most critical license condition, respondents remain entitled to licenses. At most, the FCC

[4] Respondents err in asserting (Br. 26) that the FCC's construction "would empty" Section 525 "of meaning," because "[t]he government can always articulate some regulatory motive for automatic cancellation." As demonstrated above, the procedures made available by the FCC would be wholly foreign to a regime motivated solely by pecuniary, rather than regulatory, concerns. Those procedures both take the FCC's rules out of Section 525's prohibition on cancellations "solely because" of nonpayment and distinguish other schemes motivated solely by pecuniary goals. Moreover, federal courts have no difficulty distinguishing regulatory from nonregulatory purposes in other bankruptcy contexts. See Arctic Slope Br. 26-27; Gov't Br. 44; Pet. App. 119a, 125a-126a.

was obligated to allow for the possibility that, for unforeseen reasons, enforcing the license condition would not serve its underlying purpose and the public interest in a particular case. The FCC did allow for that possibility, and therefore the licenses did not cancel "solely because" of default.[5]

B. FCC License Conditions Are Not Debts That Are Dischargeable In Bankruptcy

The condition in FCC licenses requiring timely payment is not a debt, let alone one dischargeable in bankruptcy. As respondents acknowledge, a debt under the Bankruptcy Code is a claim for payment or an enforceable obligation to pay. But the licenses, as opposed to the underlying notes, do not provide the FCC with a right to compel payment. The FCC can no more force timely payment than it can force a licensee to build out its network. In either case, the FCC can make the licensee choose between compliance and continued enjoyment of the license, but it cannot force the licensee to pay. Respondents argue (Br. 20) that the underlying notes involve an enforceable obligation to pay, like other debts. But respondents cannot change the fundamental character of the license conditions by changing the subject. The status of the underlying *notes* does not make the *license condition* an enforceable obligation.[6]

Respondents likewise claim (Br. 21) that all pre-bankruptcy obligations not listed as exempt from discharge—

---

[5] Even if respondents were correct that Section 525 required the FCC to rewrite its rules to replace rulemakings and waivers with *de novo* public interest review, the proper remedy would not have been for the D.C. Circuit to *award* the licenses to respondents. It would be to remand to the FCC for the sort of proceeding that Section 525 purportedly requires. Accordingly, respondents' *own* theory of Section 525, at best, entitles them to vacatur of the decision below.

[6] Respondents err in claiming (Br. 20) that the "source" of the regulatory payment condition is not the licenses or the FCC's regulations, but the "Installment Payment Plan Note." The licenses and the regulations do incorporate the terms of the Note by reference. But that merely prevents the FCC from having to repeat the precise terms and conditions in each document. Moreover, the payment condition is inherent in the use of auctions to allocate licenses.

including license conditions—are dischargeable under 11 U.S.C. 1141(d)(1)(A). This again fails to distinguish between regulatory conditions, which bankruptcy courts cannot alter or discharge, and independent payment obligations or mere debts. As the Second Circuit held, bankruptcy courts cannot alter the regulatory terms of FCC licenses, including the full and timely payment condition, while the licensee retains the license. Pet. App. 232a-235a.[7] Bankruptcy courts are limited to adjusting any "financial claims" between the FCC and licensees once the FCC has exercised its regulatory power to reclaim licenses. *Id.* at 236a-237a & n.11. Hence, regulatory conditions, including the timely payment obligations, are not dischargeable in bankruptcy and, as common sense suggests, nothing in Section 525 entitles a licensee to continue enjoying a license without paying for it.

Respondents abandon the D.C. Circuit's contrary analysis of dischargeability, including that court's (clearly incorrect) assertion that Section 525 empowered *it* to discharge license conditions in bankruptcy. See Gov't Br. 31-32. Instead, respondents assert (Br. 31) that a *bankruptcy court* can discharge license conditions but cannot prevent an agency from "react[ing]" to the change "by canceling the licenses." Respondents avoid spelling out this approach because of its fatal contradictions. On the one hand, if a bankruptcy court cannot modify license conditions, then the payment condition is *not* dischargeable in bankruptcy, much less dischargeable while respondents continue to hold the license. Instead, the FCC retains regulatory authority to cancel the licenses in the public interest, as it did here. On the other hand, if a

---

[7] Respondents incorrectly state (Br. 30) that the Second Circuit found "'no occasion to express an opinion' whether [the] Bankruptcy Code precludes revocation." In fact, the Second Circuit expressed no view on "the merits of" the "*bankruptcy court['s] * * * arguments* against revocation," which were that "granting the [l]icenses at a small fraction of NextWave's original successful bid best effectuated the [Federal Communications Act's] goals," and that the FCC's actions were arbitrary and capricious. Pet. App. 126a-127a (emphasis added). Those *Communications Act* arguments, the court held, should be addressed to the D.C. Circuit under the Communications Act, 47 U.S.C. 402, and the Hobbs Act, 28 U.S.C. 2341.

bankruptcy court can modify the *license condition* (as opposed to any underlying debt), it also can eliminate the FCC's legal right to cancel a license, which is premised on a violation of the license condition. If the license condition is truly subject to modification and discharge, the bankruptcy court can rewrite the license, as the bankruptcy court purported to do here, to declare that "for a price of $1.023 billion NextWave [sh]ould retain licenses for which it had bid $4.74 billion." The Second Circuit wisely rejected that approach because it "impair[s] the FCC's method for selecting licensees" and "effectively award[s] the [l]icenses to an entity that the FCC determined was not entitled to them." Pet. App. 235a. More broadly, the prospect of bankruptcy courts determining the *true* value of government licenses (and the *best licensee* to hold them) is an untenable but inevitable result of respondents' theory.[8]

Respondents' theory also creates an inappropriate conflict between Section 525 and the Communications Act. The Communications Act vests exclusive authority to issue licenses in the FCC and declares that no license "shall be construed to create any right, beyond the terms, conditions and periods of the license." 47 U.S.C. 301. Section 309(j) specifies that the FCC must use auctions and provides that "[n]othing * * * in the use of competitive bidding" shall "diminish the authority of the Commission under the other provisions of this [Act] to regulate or reclaim spectrum licenses." 47 U.S.C. 309(j)(6)(C). Yet respondents would accord bankruptcy courts authority to modify license conditions the FCC has imposed and expressly declined to modify

[8] This anomaly does not arise in the standard application of Section 525. If a regulator purports to revoke a non-exclusive license (*e.g.*, a drivers' license) because the licensee entered bankruptcy, Section 525 precludes revocation and the license is not revoked. But if a license is revoked for failure to meet a license condition of timely payment, restoration of the license begs the question whether the licensee must continue to make payments and in what amount and on what schedule. Section 525 provides no guidance on those questions, because it was never intended to excuse compliance with regulatory conditions or to entitle a bankrupt to enjoy an exclusive government license without paying for it.

on regulatory grounds; and they would convert the use of auctions into a reason for "diminish[ing] the authority of the FCC" to reclaim licenses upon breach of regulatory conditions. And, while Section 309(j)(3)(A) directs that licenses be issued and spectrum utilized without undue "administrative or judicial delay," respondents propose a construction of Section 525 that would routinely produce sizeable judicial delays. Finally, by construing Section 525 to allow them to retain their licenses despite violating universally applicable regulatory requirements and despite FCC public interest determinations, respondents would convert Section 525 from a prohibition on discrimination *against* debtors into a requirement of discrimination *in their favor*. See Gov't Br. 33-35; *Duffey* v. *Dollison*, 734 F.2d 265, 273 (6th Cir. 1984) (Section 525 "not * * * intended by Congress to afford debtors * * * preferential treatment").

Respondents claim (Br. 32-33) that the regulatory payment condition is "dischargeable" because, if the licenses were returned, the remaining debt could be discharged. Again respondents fail to distinguish between regulatory license conditions and ordinary debts. The regulatory payment *condition of the licenses* does not become "dischargeable" when the licenses are returned. Instead, *it ceases to exist*, because it persists only so long as the licensee retains the licenses. A similar error infects respondents' metaphysical assertion (Br. 33) that the license payment condition "is discharged when a reorganization plan provides for full payment of a claim according to the original terms of the obligation." That argument assumes its conclusion—that the payment *condition* in the license (as opposed to the payment *obligation* that exists independent of the license) is actually "discharged" and replaced by the bankruptcy court with a "new" identical condition, rather than passing through unaltered. Cf. *In re National Gypsum Co.*, 208 F.3d 498, 504 n.4 (5th Cir.) (executory contract neither assumed nor rejected "will 'ride through' the proceedings"), cert. denied, 531 U.S. 871 (2000); *Federal's, Inc.* v. *Edmonton Inv. Co.*, 555 F.2d 577, 583 (6th Cir. 1977) (same); V. Countryman,

Executory Contracts in Bankruptcy, 58 Minn. L. Rev. 479, 561-562 (1974) (non-action "means nondischargeability").

The Bankruptcy Code's treatment of executory contracts confirms by analogy that the payment conditions are not dischargeable, since a debtor's obligations under executory contracts cannot be eliminated while the debtor seeks to retain the benefits thereof. See Gov't Br. 32-35.[9] Respondents have conceded that, if a debtor "assumes" an executory contract, its payment obligations are treated as a post-petition debt that "would not be dischargeable." Br. in Opp.

[9] Contrary to respondents' claims (Br. 21-24), neither *Ohio* v. *Kovacs*, 469 U.S. 274 (1985), nor *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552 (1990), resolves the dischargeability issue. Neither of the obligations at issue in those cases was executory, such that the obligations were not "debts" while the agreements remained in force. See Gov't Br. 35 n.11. In fact, *Kovacs* supports the government's view. In that case, the State had entered an order requiring the debtor to clean up contaminated property. Although the Court did not question the State's authority to regulate the conditions under which the debtor could keep the property, the State in that case had divested the debtor of the property, an act that "converted" the clean-up order "into an obligation to pay money" divorced from regulation of the property itself. 469 U.S. at 283. The Court held that such a naked payment order is a "debt," but it did "not question that *anyone in possession* of the [polluted] site" must "comply with the environmental laws of the State of Ohio." *Id.* at 274, 285. Similarly here, a naked FCC order to pay money *after* the FCC recovers the licenses may be dischargeable. But anyone *in possession* of FCC licenses must "comply with the" regulatory conditions of the licenses. *Davenport* does not purport to overrule *Kovacs*. There, the Court held that a restitution order, imposed as a condition of probation, was a "debt." But it did not reach whether the debt could be discharged *while* the probationer claimed a right to remain on probation. The bankruptcy court opinion in that case, which this Court upheld, stated that probation revocation was a "complex question" which was "not present" in the case. *In re Davenport*, 83 B.R. 309, 316 n.7 (Bankr. E.D. Pa. 1988). See *Bryan* v. *Rainwater*, 254 B.R. 273 (Bankr. N.D. Ala. 2000) (bankruptcy court cannot preclude revocation of probation); *In re Gilliam*, 67 B.R. 83 (Bankr. M.D. Tenn. 1986) (similar). Here, in contrast, the FCC is seeking to cancel the licenses. The restitution order at issue in *Davenport*, moreover, was wholly unlike the payment condition at issue here, which is not merely a condition of licensure, but also the *primary* reason the licensee was selected (to the exclusion of others) to hold the license to serve the public interest.

18 & n.8; *National Gypsum*, 208 F.3d at 507. If the debtor neither assumes nor rejects an executory contract, the payment conditions likewise "ride through" bankruptcy, such that "nonaction means nondischargeability." *Id.* at 504 n.4; Countryman, *supra*, at 561-562. Finally, if the debtor *rejects* the license and returns it, the payment condition of the license expires of its own accord and again is not subject to discharge. See p. 11, *supra*. Consequently, if the FCC licenses were treated as executory obligations—and respondents nowhere deny that they are executory—the payment conditions would not be "dischargeable," much less dischargeable while respondents insist on retaining them. Respondents offer no reason why the *regulatory* payment conditions of their licenses should be more readily subject to discharge than the payment conditions in ordinary commercial licenses. Gov't Br. 34-35 & n.11; Arctic Slope Br. 31 & n.8.[10]

C. Respondents' Construction Is Contrary To Federalism Principles And Conflicts With The Code's Structure

1. Respondents' construction would also convert Section 525 into an inappropriate barrier to legitimate regulatory policies. It is one thing for bankruptcy law to bar a State, for example, from frustrating the purpose of federal bankruptcy law by canceling a license "solely because" of nonpayment of a previously discharged debt where the State's purpose is to promote public or private financial interests. That was the teaching of *Perez* v. *Campbell*, *supra*. But it is quite another thing to read federal bankruptcy law to allow bankruptcy courts to second-guess the value of state licenses, and to

[10] Respondents also have no right to "assume" the licenses, even if they are treated as mere executory contracts. See 3 *Collier on Bankruptcy* ¶ 365.06[1][d] & n.13 (2002) (debtor cannot assume contract over objection if counterparty has right to object to assignment and changes in control); 47 U.S.C. 310(d); 41 U.S.C. 15. And while respondents assert (Br. 35 n.23) that the issue was "waived," respondents raised the executory contract analogy themselves in their brief in opposition (at 17-18 & n.8). They simply shrink from the legal consequences of their own argument. Moreover, a litigant does not "waive" an apt analogy supporting its fundamental submission by not employing it below. Cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

allow bankrupts to continue enjoying such licenses without paying for them, or to override regulatory decisions.

Indeed, respondents cite *no* case in which a federal court has invalidated an agency's exercise of its regulatory authority where, as here, the agency's actions are driven by *regulatory* concerns; the payment conditions are intimately connected to the issuance of the license and the integrity of the allocation process; the agency affords licensees the opportunity to address whether enforcement would serve the rule's underlying purpose and the public interest; and the agency, after examining the circumstances confronting the licensee and providing an exception for a period of time, has determined that enforcement is necessary to achieve "appropriate regulatory policies," H.R. Rep. No. 595, 95th Cong., 1st Sess. 165 (1977). Nor do respondents show that Congress clearly intended such a grave intrusion on federal and state regulatory authority. Cf. *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226, 2232-2234 (2002) ("historic police powers" not superseded absent "clear and manifest purpose"). Congress, in fact, disavowed any such intent. "[I]t was never the intention of the Judiciary Committee to interfere with legitimate regulatory objectives." 123 Cong. Rec. at 35,673. By reading the word "solely" out of Section 525, and expanding the phrase "debt that is dischargeable" beyond its ordinary scope, respondents create precisely the intrusion on regulatory authority Congress disclaimed.[11]

---

[11] Respondents' reliance (Br. 25-26) on Section 525's exemption for certain agricultural programs is misplaced. Those exemptions clarify that there can be no effect on the Secretary of Agriculture's authority *even if* the Secretary revokes a license solely because of financial default. Furthermore, when those exemptions were proposed as a floor amendment, Section 525's sponsor found it "difficult to understand" their necessity or how "section 525 might be interpreted to prevent * * * necessary regulatory actions," since it "applies only where the discrimination is practiced 'solely'" on the basis of "whether a person is, or has been a bankrupt." 123 Cong. Rec. at 35,673. The amendment was nonetheless accepted as a potentially redundant "clarification." *Ibid.* Cf. *Chevron U.S.A., Inc.* v. *Echazabal*, 122 S. Ct. 2045, 2049-2050 (2002); *United States* v. *Vonn*, 122 S. Ct. 1043, 1049-1050 (2002). Finally, those exemptions involve government efforts to take into account past financial performance, including payments of debts, and do not involve agency efforts to insist on payment of the fee for the very license at issue, let alone to enforce regulatory conditions that are neither debts nor dischargeable in bankruptcy, where the regulator may consider other factors affecting the public interest.

2. Nothing in *Section 525's* text, title, history, or structure, supports respondents' newly minted claim that Section 525 was designed to "give the debtor-in-possession some flexibility and breathing space" (Resp. Br. 34) against a regulator's authority to protect the public interest, much less *additional* breathing space after the regulator granted a year of relief but declined to grant more based on its assessment of the public interest. First, it should be emphasized that respondents are able to rely on their more modest claim to "breathing space," rather than the broader power their theory implies—the power to rewrite federal and state regulatory licenses—only because of the happenstance that market circumstances so changed during bankruptcy that they can now offer full payment. That is far from typical in the bankruptcy context, and respondents must embrace the full consequences of their theory. Second, even respondents' effort to use Section 525 to obtain "breathing space" is misplaced. The Code provision designed to provide debtors with "breathing space"—the *automatic stay*—exempts exercises of "regulatory power," such as the FCC's, from its scope. See 11 U.S.C. 362(b)(4); Pet. App. 125a-127a; Gov't Br. 44.[12] By its terms, Section 525 categorically bars certain

---

[12] Nor is there force in respondents' reliance (Br. 19 n.12; see Creditors' Br. 8-9) on the fact that the FCC suggested legislation to clarify that its licensing decisions are unaffected by Section 525. The FCC's consistent position has been that such legislation would *clarify* the law, not alter it. App. C, *infra*, 8a. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (failure to enact change may signal Congress's view "that the existing legislation already incorporated the offered change"); App. D, *infra*, 14a-15a. Drawing inferences from legislative inaction would be particularly unwarranted here, given that the proposed clarification *was passed by the Senate*, 145 Cong. Rec. S9419, S9434 (July 27, 1999), but was stricken from the House bill by a

discriminatory acts in perpetuity; it does not purport to regulate the timing of legitimate regulatory actions. In addition, respondents' "breathing space" theory conflicts with the Communications Act, which directs the FCC to ensure "rapid deployment of new technologies, products and services" and "efficient and intensive use of the electromagnetic spectrum" *without* "administrative or judicial delays," 47 U.S.C. 309(j)(3)(A), (C) and (D). Respondents read Section 525 as imposing the very delays—during which debtors may warehouse spectrum licenses while deciding whether and how to pay for them—the Communications Act seeks to avoid.[13]

3. Respondents' reading of Section 525 is incompatible with the auction process. Indeed, their construction would threaten to preclude the FCC from denying a license to a bidder in response to its failure to make good on its bid *before* the license is issued, because Section 525 also states that a governmental agency may not "deny" a license "solely because" of a dischargeable financial default. 11 U.S.C. 525(a). See Gov't Br. 49; Arctic Slope Br. 42-44.

Here, respondents were among "a handful of large bidders" that "bid extremely high prices" per population unit—much more than the majority of successful C-block bidders. 12 FCC Rcd at 16,442 (¶ 10). Although respondents *now* purport to be willing to pay in full, for years the spectrum

single member *without vote*, see 145 Cong. Rec. H12741-H12742 (Nov. 18, 1999). Far more significant is Congress's "failure to revise or repeal the agency's interpretation" when expanding the FCC's auction authority in 1997, which "is persuasive evidence that the interpretation is the one intended by Congress." *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986). Indeed, Congress concluded that the FCC's auction regime had "proven to be consistent with the Committee's long-term goals for telecommunications policy." H.R. Rep. No. 149, 105th Cong. 1st Sess. 558 (1997).

[13] Respondents' claimed "right to cure" its defaults (Br. 35, 40)—a matter not addressed below and not within the scope of the question presented—rests on a misconstruction of 11 U.S.C. 1123(a)(5)(G) and 1124(2)(A). Neither of those provisions creates a *right* to cure *regulatory* defaults or to force a regulator to award a license where it does not serve the public interest, and any cure rights necessarily terminated when the licenses canceled. Cf. *In re DeSeno*, 17 F.3d 642, 644 (3d Cir. 1994).

lay fallow as respondents failed to make even their first installment payment, disclaimed willingness *ever* to pay the bid amount, and labeled their agreement to pay so unreasonable as to be "constructively fraudulent." Only after the Second Circuit rejected their effort to reduce the payment condition by 80 percent, and only after the licenses *increased in value* dramatically, did respondents become willing to pay in full. A system of auctions that is designed to identify the bidder that values the spectrum most highly and place spectrum rapidly into public service cannot function if winning bidders can warehouse licenses—leaving spectrum unused and the public unserved—while they tergiversate on whether to meet license conditions in light of changing market conditions and litigation fortunes. Congress directed the FCC to establish auctions, not issue options contracts. Although respondents dispute the rationality of such a bidding strategy, this case proves otherwise, and underscores the FCC's regulatory concerns. After outbidding other applicants by agreeing to pay $4.7 billion for the licenses and trying to keep them for just over $1 billion, respondents now claim an unrestricted right to retain the licenses for the original bid price of $4.7 billion because the value of the licenses rose to as much as $16 billion during protracted bankruptcy proceedings. That is a profitable option for a "thinly capitalized" company that made only limited downpayments and has never offered service to the public. If this Court were to bless that heads-I-win-tails-you-lose scenario, it is hard to see why others would not seek to replicate respondents' maneuvers.

Respondents suggest that, absent their construction, government creditors might "plunder the estate" by "taking advantage of creditor protections under the Code when the value is low" and seizing "collateral when the value is high." Resp. Br. 23, 50. By its terms, however, Section 525 does not address that issue, because it does not address the *time* during which government agencies may withdraw licenses; it merely bars them from withdrawing licenses "solely because" the debtor failed to pay a debt "that is dischargeable."

To the extent regulators seek to promote financial rather than regulatory interests, such concerns are addressed by the automatic stay, 11 U.S.C. 362, which permits agency action to proceed despite bankruptcy only if it is *regulatory* in nature. Gov't Br. 43-44. The FCC, moreover, does not pursue financial returns over the public interest. Cf. 47 U.S.C. 309(j)(7)(B). "[I]mportant communications policy objectives" are not to be "sacrificed in the interest of maximizing revenues." H.R. Rep. No. 111, 103d Cong., 1st Sess. 258 (1993). The FCC "is not a collection agency." *Ibid.*

The suggestion that the FCC changed its position along with market conditions (Urban Comm. Br. 22) is baseless. The FCC's *Restructuring Orders*, for example, allowed respondents and others to return licenses and avoid payment without financial penalty at a time when, by respondents' own account (Br. 5 n.2), license values were depressed. Indeed, the FCC ended up re-auctioning each of those returned licenses at a loss in Auction 22. See App. A, *infra*, 1a-6a. Where the Commission recovered licenses after default, it again re-auctioned almost every license at a loss. See App. B, *infra*, 7a. Even when respondents insisted that the licenses at issue here were worth only one-quarter of respondents' original bid—and that the FCC would be financially better off accepting their reduced offer than re-auctioning the licenses—the FCC insisted that the bankruptcy court should return the licenses to it. C.A. App. 589.

> Court: So, the FCC might get more money for the American public under a new license or it might get less?
>
> [Gov't]: Money is not the end goal. * * *
>
> Court: Money is not the objective.
>
> [Gov't]: No. * * * Congress told us what the objective was. * * * A fair and efficient allocation of the limited resource of radio spectrum.
>
> Court: All right, I hear the words. They have no content for me.

Id. at 590-591. See note 14, *infra*.

The claim that the FCC misled respondents' creditors is also without merit. The FCC has consistently insisted that payment conditions "remain fully enforceable by the FCC even though NextWave is in bankruptcy." C.A. App. 553. In September of 1997, well before respondents filed for bankruptcy, the FCC Commissioners advised members of Congress that they disagreed with the argument of many C-block licensees "that, even if they default on their installment payments, the Commission cannot take back and reauction spectrum licenses while bankruptcy litigation is ongoing. *We believe this is an incorrect reading of the statutory scheme and that we ultimately will prevail in court.*" If license conditions are not "met, the licenses automatically revert to the FCC." App. C, *infra*, 8a-9a. When respondents first filed for bankruptcy and told the FCC that, in their view, bankruptcy excused them from complying, the FCC replied that bankruptcy "did not relieve" them of their "regulatory obligations." Pet. App. 69a. And when the bankruptcy court held its hearing on remedies—while respondents were arguing that the licenses were worth only one quarter of what they had bid, and *before* the creditors committed additional money to fund full payment—the FCC repeatedly told the court that, "first and foremost, the FCC wants the license back." C.A. App. 563-564. Respondents' bankruptcy counsel had no difficulty understanding the FCC's position as "we want the licenses." *Id.* at 597.[14]

Respondents and their amici nonetheless fault the FCC for not *announcing* the re-auction until January 2000. The timing of the Commission's Public Notice is hardly surprising. The bankruptcy court denied the FCC's motion to lift

---

[14] C.A. App. 565 ("[F]irst and foremost, * * * the licenses must come back as a matter of regulatory law."); *id.* at 568 ("That the licenses should cancel. That they should revert to the FCC."); *id.* at 573 ("The Court: Okay. So, you want to take back the licenses. Mr. Alter: That's right."); *id.* at 581 ("The foremost concern of the FCC as regulator, is to receive the licenses back."); *id.* at 589 ("Our paramount request is that the licenses return to the FCC."); *id.* at 590 ("[O]f paramount importance, is receiving the licenses back so the FCC can fulfill its public charge with regard to the limited and very precious resource of spectrum.").

the automatic stay to recover its licenses, see Pet. App. 293a, and the Second Circuit did not reverse until December 1999, *id.* at 213a. As the Second Circuit recognized, it was "[b]ecause of the ongoing litigation" that the FCC had "not yet sought to take any action vis-à-vis the [l]icenses." *Id.* at 245a n.15. And the Second Circuit recognized that its decision opened the door to FCC action, noting that "it would probably be fair to assume that the FCC will seek to revoke the [l]icenses." *Ibid.*

* * * * *

Respondents' effort to use Section 525 to defeat the FCC's regulatory efforts is not supported by Section 525's text, purpose or history. To the contrary, by reading the word "solely" out of Section 525, and treating regulatory license conditions as "dischargeable debts," respondents and the decision below would inappropriately convert Section 525 into a barrier to the achievement of regulatory goals—a result Congress specifically disclaimed—and place that provision in conflict with the system of auctions Congress established through Section 309(j). Accordingly, for the foregoing reasons and those stated in our brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
*Acting Solicitor General**

JOHN A. ROGOVIN
Acting General Counsel
Federal Communications Commission

* The Solicitor General is disqualified in this case.

APPENDIX A

30 MHz LICENSES RETURNED UNDER RESTRUCTURING ORDERS

Market Name	Original C Block Winning Bid	Auction 22 Winning Bid
Aberdeen, SD	$411,666	$93,000
Ada, OK	$783,000	$0
Alpena, MI	$475,500	$156,400
Amarillo, TX	$7,252,500	$3,567,000
Anchorage, AK	$4,922,250	$873,750
Anderson, IN	$2,083,712	$78,140
Ardmore, OK	$1,653,750	$62,016
Athens, OH	$1,356,825	$50,882
Augusta, GA	$13,067,250	$1,317,750
Bakersfield, CA	$26,941,575	$1,875,950
Baton Rouge, LA	$25,515,000	$2,745,750
Beaumont, TX	$15,083,250	$565,622
Beckley, WV	$731,258	$413,950
Bend, OR	$1,666,500	$280,500
Benton Harbor, MI	$4,206,000	$346,800
Bismark, ND	$557,275	$0
Bloomington, IL	$5,391,000	$1,708,500
Bluefield, WV	$1,458,751	$124,950
Blytheville, AR	$471,750	$18,000
Boise, ID	$7,742,325	$632,250
Brownwood, TX	$976,500	$223,500
Buffalo, NY	$34,326,011	$3,073,600
Butte, MT	$260,833	$0
Canton, OH	$8,987,250	$381,959
Cape Girardeau, MO	$2,502,750	$93,854
Carbondale, IL	$2,370,750	$0
Carlsbad, NM	$521,250	$325,500
Casper, WY	$1,531,500	$57,431
Champaign, IL	$6,065,250	$718,500
Cheyenne, WY	$3,684,750	$0
Chicago, IL	$461,009,045	$117,873,000
Columbia, MO	$3,518,250	$494,700
Columbus, GA	$5,265,000	$953,000
Corpus Christi, TX	$10,306,508	$825,750
Cumberland, MD	$2,516,250	$125,813

30 MHz LICENSES MADE AVAILABLE BY RESTRUCTURING ORDERS (cont'd)

Market Name	Original C Block Winning Bid	Auction 22 Winning Bid
Dallas, TX	$291,023,250	$62,412,000
Dalton, GA	$1,221,000	$45,788
Danville, VA	$6,534,754	$245,054
Davenport, IA	$13,889,250	$1,639,500
Daytona Beach, FL	$18,351,000	$688,163
Decatur, IL	$6,142,500	$285,000
Des Moines, IA	$19,164,750	$3,786,750
Detroit, MI	$172,738,500	$13,177,550
Dickinson, ND	$205,501	$8,250
Dubuque, IA	$5,328,000	$1,040,250
Eagle Pass, TX	$941,250	$116,250
East Liverpool, OH	$585,038	$24,864
El Dorado, AR	$846,000	$56,250
Elkhart, IN	$6,620,250	$452,200
Enid, OK	$285,750	$0
Erie, PA	$6,870,750	$292,007
Escanaba, MI	$1,257,750	$146,200
Eugene, OR	$15,066,000	$714,750
Fairbanks, AK	$562,500	$0
Fairmont, WV	$526,500	$79,000
Fayetteville, AR	$2,282,250	$85,585
Findlay, OH	$1,996,163	$84,838
Flint, MI	$8,615,250	$685,950
Ft Smith, AR	$4,660,501	$356,250
Ft Wayne, IN	$19,629,962	$834,274
Fredericksburg, VA	$6,122,254	$229,585
Fresno, CA	$47,026,575	$3,243,000
Garden City, KS	$364,500	$42,500
Great Bend, KS	$191,250	$13,600
Great Falls, MT	$640,000	$67,500
Hammond, LA	$2,466,075	$631,500
Harrisburg, PA	$17,457,761	$1,603,100
Hartford, CT	$51,321,750	$1,924,566
Hastings, NE	$930,076	$39,528
Hilo, HI	$3,611,262	$135,423

30 MHz LICENSES MADE AVAILABLE BY RESTRUCTURING ORDERS (cont'd)

Market Name	Original C Block Winning Bid	Auction 22 Winning Bid
Honolulu, HI	$53,594,250	$2,828,250
Houghton, MI	$180,375	$51,000
Huntington, WV	$4,972,500	$729,300
Huron, SD	$384,000	$14,400
Hyannis, MA	$9,000,000	$420,750
Idaho Falls, ID	$4,440,750	$166,529
Iowa City, IA	$2,564,250	$401,250
Iron Mountain, MI	$318,750	$22,500
Ironwood, MI	$198,356	$8,250
Jamestown, NY	$3,793,500	$0
Jefferson City, MO	$2,122,500	$160,650
Johnstown, PA	$2,480,000	$0
Jonesboro, AR	$1,853,250	$76,500
Juneau, AK	$622,613	$0
Kalamazoo, MI	$8,403,000	$546,550
Kankakee, IL	$912,203	$190,500
Keene, NH	$3,795,000	$0
Kirksville, MO	$287,250	$74,800
Lafayette, LA	$15,265,500	$572,250
Lancaster, PA	$13,198,416	$686,800
Laredo, TX	$6,799,583	$322,500
Las Salle, IL	$1,930,500	$391,000
Lebanon, NH	$4,451,261	$189,179
Lewiston, ID	$537,075	$59,250
Liberal, KS	$318,750	$25,500
Lihue, HI	$2,512,500	$94,219
Lima, OH	$3,426,000	$145,605
Little Rock, AR	$22,610,250	$3,693,750
Logan, UT	$276,825	$104,250
Logan, WV	$639,000	$0
Longview, TX	$4,059,000	$152,213
Lufkin, TX	$2,840,250	$0
Lynchburg, VA	$6,144,001	$230,401
McAlester, OK	$774,000	$29,025

30 MHz LICENSES RETURNED UNDER RESTRUCTURING ORDERS (cont'd)

Market Name	Original C Block Winning Bid	Auction 22 Winning Bid
McComb, MS	$2,424,000	$420,750
Macon, GA	$11,700,076	$968,000
Mankato, MN	$4,216,500	$441,750
Mansfield, OH	$5,541,000	$235,493
Marinette, WI	$1,604,250	$60,160
Marion, OH	$1,211,250	$0
Marquette, MI	$1,252,500	$159,800
Mattoon, IL	$434,325	$20,250
Medford, OR	$4,284,750	$310,500
Michigan City, IN	$886,500	$58,500
Minot, ND	$251,666	$0
Missoula, MT	$789,000	$29,588
Mitchell, SD	$399,000	$26,250
Mt. Vernon, IL	$1,353,000	$81,600
Muncie, IN	$2,396,462	$89,868
Natchez, MS	$741,000	$27,788
Norfolk, NE	$814,500	$34,616
Olean, NY	$4,697,250	$0
Paris, TX	$2,292,750	$0
Parkersburg, WV	$1,896,000	$240,000
Peoria, IL	$13,511,250	$2,059,500
Pine Bluff, AR	$1,530,750	$57,750
Pittsfield, MA	$3,002,261	$127,597
Pocatello, ID	$1,020,000	$72,000
Poplar Bluff, MO	$1,381,500	$57,000
Portsmouth, OH	$1,253,250	$0
Pottsville, PA	$4,561,511	$228,076
Presque Isle, ME	$562,500	$0
Provo, UT	$6,678,075	$275,250
Quincy, IL	$1,531,500	$700,500
Rapid City, SD	$1,470,001	$225,250
Reno, NV	$27,802,575	$1,651,500
Rochester, MN	$4,389,000	$239,700
Rochester, NY	$27,255,011	$2,324,750
Rockford, IL	$14,433,000	$2,509,500

30 MHz LICENSES RETURNED UNDER RESTRUCTURING ORDERS (cont'd)

Market Name	Original C Block Winning Bid	Auction 22 Winning Bid
Rolla, MO	$804,750	$30,179
Rome, GA	$1,584,000	$59,400
Roseburg, OR	$1,659,000	$62,213
St. Cloud, MN	$6,826,043	$1,602,000
St. Louis, MO	$104,425,580	$14,611,500
Salem, OR	$17,070,000	$704,250
Salina, KS	$1,200,750	$51,032
Salisbury, MD	$4,878,750	$0
Salt Lake City, UT	$82,293,825	$3,394,500
Sault Ste. Marie, MI	$929,250	$170,000
Sherman, TX	$5,995,501	$1,274,250
Shreveport, LA	$12,926,250	$586,500
Sioux Falls, SD	$5,147,345	$239,250
Springfield, IL	$7,650,750	$615,000
Springfield, MA	$22,495,511	$1,229,100
State College, PA	$2,597,261	$129,864
Steubenville, OH	$1,221,000	$0
Sunbury, PA	$4,591,511	$229,576
Texarkana, TX	$2,760,750	$128,250
Tupelo, MS	$4,520,438	$169,517
Twin Falls, ID	$2,574,000	$96,525
Tyler, TX	$9,651,000	$361,913
Valdosta, GA	$1,689,008	$149,250
Vicotria, TX	$2,301,666	$86,313
Waco, TX	$5,889,750	$318,000
Watertown, SD	$534,750	$34,000
Waycross, GA	$576,751	$431,250
West Plains, MO	$262,500	$0
Wheeling, WV	$2,025,000	$171,000
Wichita, KS	$9,632,337	$1,455,750
Wichita Falls, TX	$4,292,259	$945,750
Williamsport, PA	$2,241,761	$112,089
Williston, ND	$462,755	$17,354
York, PA	$9,045,011	$613,700
Youngstown, OH	$12,059,250	$512,519

30 MHz LICENSES RETURNED UNDER RESTRUCTURING ORDERS (cont'd)

Market Name	Original C Block Winning Bid	Auction 22 Winning Bid
Zanesville, OH	$1,401,750	$52,566
Guam	$1,073,250	$53,663
U.S. Virgin Islands	$7,797,750	$419,050
Northern Mariana Islands	$422,250	$21,113
TOTAL	**$2,111,873,440**	**$292,503,485**

APPENDIX B

30 MHz LICENSES REAUCTIONED BECAUSE OF LICENSEE DEFAULT

Market Name	**Original C Block Winning Bid**	**Auction 22 Winning Bid**
Ashtabula, OH	$900,000	$38,250
Bowling Green, KY	$3,783,750	$141,891
Bozeman, MT	$1,714,501	$64,295
El Centro, CA	$5,362,500	$201,000
Flagstaff, AZ	$3,506,250	$131,485
Glens Falls, NY	$1,650,000	$61,875
Grand Junction, CO	$4,879,500	$357,000
Greeley, CO	$3,840,750	$0
Hays, KS	$492,000	$40,800
Helena, MT	$1,158,000	$0
Kahului, HI	$7,752,000	$352,500
Kalispell, MT	$715,501	$0
Lawrence, KS	$2,991,000	$112,163
Madisonville, KY	$692,250	$25,960
Manahattan, KS	$2,910,000	$109,125
Nogales, AZ	$1,240,500	$46,519
Owensboro, KY	$2,468,250	$92,560
Paducah, KY	$2,417,250	$0
Phoenix, AZ	$213,807,750	$11,188,500
Plattsburgh, NY	$1,282,500	$0
Prescott, AZ	$4,575,000	$171,563
Pueblo, CO	$4,991,675	$187,188
Richmond, IN	$855,000	$35,250
Rock Springs, WY	$849,000	$40,500
Sierra Vista, AZ	$2,242,500	$84,094
Somerset, KY	$1,522,500	$57,094
TOTAL	**$285,440,677**	**$13,796,140**

APPENDIX C

[Seal Omitted]

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON

September 17, 1997

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
U.S. House of Representatives
B351C Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Hyde and Congressman Conyers:

We are writing to urge you to adopt legislation that would clarify that wireless licensees who default on their installment payments may not use bankruptcy litigation to refuse to relinquish their spectrum licenses for reauction. The Administration and Chairman Hundt previously sought such legislation as part of budget reconciliation. We are writing now to emphasize the importance of this legislation and the need for quick action.

A number of the FCC's Personal Communications Services (PCS) "C-Block" auction licensees have argued that, even if they default on their installment payments, the Commission cannot take back and reauction spectrum licenses while bankruptcy litigation is ongoing. We believe this is an incorrect reading of the statutory scheme and that we ultimately will prevail in court. We

specifically believe that FCC licenses are not "property" subject to the bankruptcy code. Moreover, it is our view that we have granted these PCS licenses subject to conditions, and, should those conditions not be met, the licenses automatically revert to the FCC. However, in the absence of clarifying legislation, there is a risk that valuable spectrum licenses will be tied up in litigation, delaying the return and reauction of the licenses, the introduction of new services and competition, and the collection of revenues.

We do not believe that Congress intended to allow licensees to use Chapter 11 or Chapter 7 bankruptcy litigation as a haven to horde valuable FCC licenses. We strongly urge you to adopt legislation that would clarify that provisions of the Bankruptcy Code are not applicable to any FCC license for which a payment obligation is owed, do not relieve any licensees from payment obligations, and do not affect the Commission's authority to revoke, cancel, transfer or assign such licenses. It would greatly assist in restoring certainty to the marketplace.

Thank you for your consideration of the enclosed proposed legislation. We would be happy to answer any questions you may have.

Sincerely,

/s/ REED E. HUNDT
REED E. HUNDT
Chairman

/s/ JAMES QUELLO
JAMES QUELLO
Commissioner

/s/ SUSAN NESS
SUSAN NESS
Commissioner

/s/ RACHELLE CHONG
RACHELLE CHONG
Commissioner

Attachment

CC: The Honorable Orrin Hatch
The Honorable Patrick J. Leahy
The Honorable Charles Grassley
The Honorable Richard Durbin
The Honorable George Gekas
The Honorable Jerrold Nadler

APPENDIX D

[Names Omitted]

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

August 9, 2002

The Honorable John Ashcroft
Attorney General
Department of Justice
10th and Constitution Avenue, N.W.
Washington, DC 20530

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Dear Attorney General Ashcroft and Chairman Powell:

We write to express our support for your efforts at the Supreme Court to ensure that the will of Congress is implemented with respect to the competitive bidding process Congress established to allocate the electromagnetic radio spectrum fairly and efficiently. Specifically, your position that current communications law authorizes the Federal Communications Commission (FCC) to reclaim spectrum licenses from a bankrupt bidder is consistent with the intent of Congress when the law was passed.

Before Congress amended the Communications Act, spectrum was awarded randomly by lottery to any person who put his card in the hat and had the good fortune to have

his card pulled out. The lottery process rewarded speculators least able to utilize the spectrum and made wealthy speculators who paid the requisite minimal fee for the right to participate in the lottery. The FCC also used a comparative hearing process which significantly delayed the award of licenses and slowed the rollout of new and innovative service to consumers.

Congress rejected both approaches, and substituted instead the competitive bidding process at issue today. As principal Members of the Senate Committee on Commerce, Science, and Transportation, which held hearings on and marked up this legislation, and later negotiated the final version of the law in conference with our House counterparts, we are uniquely situated to provide you with an understanding of Congressional intent on this issue.

Some of our colleagues who do not sit on the Commerce Committee have joined in an amicus brief that expresses the view that the Bankruptcy Code (11 U.S.C. 525) trumps the clear authority we granted to the FCC to reclaim spectrum licenses from a bankrupt bidder that has failed to make timely payments in compliance with the condition of the license. There is no legislative record that the Judiciary Committee which has jurisdiction over the bankruptcy laws ever held hearings on this issue or that it considered the relationship between the bankruptcy laws of the United States and the Communications Act when the legislation was considered. The only expression of Congressional intent with respect to the bidding process was in the hearing records, Committee reports, and conference report from the Senate and House Commerce Committees.

The plain fact of the matter is that there was no discussion of the bankruptcy laws at all when Congress enacted the competitive bidding provisions of section 309(j) of the Communications Act, because there was no perceived conflict between the two laws. See House Report 103-213 (1993), House Report 103-111 (1993), and Senate Hearing 103-53 (1993). Section 309(j) does not conflict with section

525 or any other provision of the Bankruptcy Code. Furthermore, in the absence of clear statutory language or legislative history to the contrary, the courts are charged with construing the statutes as consistent with each other.

We strongly disagree with the views expressed in the amicus brief, and write to clarify for you and the Court the intent of the Senate Committee that wrote the law. The policy objectives which informed our legislative judgment include: the rapid and efficient deployment of new services to the public; avoiding speculation, litigation, warehousing of spectrum, and unjust enrichment; permitting small businesses, women and minorities an opportunity to participate; and a return to the public of some value for the public resource being used for commercial gain.

It was never Congress' intention that the spectrum at issue be tied up in litigation for years on end while thousands of cellular calls are dropped each day for lack of available spectrum. It was never Congress' intention to permit a successful bidder to escape his legal obligation to consumers, the FCC, and the government. But that is exactly what has happened in the Nextwave cases.

Nothing in the legislative history or the Congressional debates leading up to enactment of the spectrum auction provision—section 309(j) of the Communications Act—supports the views in the amicus brief. The law itself is clear on its face that nothing in the establishment or implementation of a competitive bidding process should undermine or supercede the exclusive authority Congress bestowed on the FCC to grant—and reclaim—licenses based on the public interest. If there was no reclamation process, the conditions imposed on the licensees—including the condition to make timely payments—would be meaningless. Licensees could ignore the conditions at will if the agency had no recourse and force the issue to be resolved in a long, protracted litigation battle. We never intended such a result, and nothing in the legislative history supports that view.

In fact, Congress took some care to note that no ownership of the spectrum was granted to a successful bidder, and that nothing in the establishment or implementation of a competitive bidding process would undermine or supercede the FCC's continued ability to exercise its authority to grant and reclaim licenses in the public interest. See 47 U.S.C. 301 and 309(j)(6). Also, the Supreme Court has repeatedly found that the FCC is the agency vested with exclusive authority by Congress to grant spectrum licenses. Nothing in section 309(j) or the Bankruptcy Code changes that exclusive authority. As a result, no court can grant an applicant an authorization which the FCC has refused. Therefore, consistent with the FCC's rules, once a winning bidder receives a license, it must continue to comply with the FCC's rules or else it loses its license. The Bankruptcy court cannot relieve a licensee of this regulatory requirement. As the Second Circuit correctly noted, if a winning bidder can have the conditions of its license modified under the Bankruptcy Code, then the mechanism, the auction process, chosen by Congress to resolve mutually exclusive applications among qualified bidders would be worthless. See 200 F.3d 43 at 59. Therefore, the Second Circuit got it right.

The improper application of the bankruptcy laws urged in the amicus brief is preventing each of our policy objectives from being achieved—at least with respect to spectrum at issue in the Nextwave cases. And it would set a dangerous precedent for future auctions. In fact, some of those who bid in Auction 35—the auction held on the spectrum the FCC reclaimed from Nextwave—have considered filing bankruptcy themselves on the theory that the bankruptcy court might allow them to pay less than they bid for the spectrum.

We note that the amicus brief cites subsequent efforts by the FCC to get specific legislation enacted to provide an explicit waiver of the bankruptcy laws as evidence that their argument is correct. We once again disagree. In fact, we were among the principal sponsors of that legislative effort as senior Members of the Senate Committee on Appropria-

tions. Our pursuit of legislation in the past was rooted not in a belief that the law itself was in any way flawed or unclear, but rather in our frustration with the flawed interpretation of the law by various courts. The fact that an agency, party, or Member of Congress seeks to short circuit years of contentious litigation by clarifying—not changing—existing legislative authority is not conclusive evidence of anything other than a desire to obtain a speedier or more certain result.

Thank you for this opportunity to clarify the intent of Congress with respect to the relationship between the Bankruptcy Code and the Communications Act. We believe the Second Circuit was correct in interpreting Congress' intent, and firmly believe the government should prevail in this case.

With best wishes.

Cordially,

/s/ TED STEVENS
TED STEVENS

/s/ FRITZ HOLLINGS
FRITZ HOLLINGS

MOTION FILED
FEB - 1 2002

(4)

No. 01-653

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC. and NEXTWAVE POWER PARTNERS INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF URBAN COMM-NORTH CAROLINA, INC., DEBTOR-IN-POSSESSION, IN SUPPORT OF RESPONDENTS

PREBEN JENSEN
Counsel of Record
CHARLES E. SIMPSON
DELTON VANDEVER
WINDELS MARX LANE
AND MITTENDORF, LLP
Attorneys for Amicus Curiae
156 West 56th Street
New York, New York 10019
(212) 237-1000

172076

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

21 pp

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Urban Comm-North Carolina, Inc. ("UC-NC") respectfully moves pursuant to Rule 37.2 of the Court for leave to file the accompanying brief as *amicus curiae* in support of Respondents herein, NextWave Personal Communications Inc. and NextWave Power Partners Inc. (collectively "NextWave"). The Solicitor General, attorney for Petitioner, the Federal Communications Commission ("the Commission"), has consented to the filing of an *amicus curiae* brief by UC-NC, and his letter of consent has been lodged with the Court. UC-NC has requested but not received the consent of NextWave to the filing of the brief.

As explained more fully in the attached brief under "Interest of *Amicus Curiae*," UC-NC has a critical interest in seeing the petition of the Commission for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit ("the Petition") denied inasmuch as UC-NC stands in the same position vis-a-vis the Commission as NextWave. Like NextWave, UC-NC was granted broadband personal communication services ("PCS") spectrum licenses auctioned by the Commission but was, as were NextWave and other licensees, subsequently forced to seek the protection of Chapter 11 of Title 11 of the United States Code ("the Bankruptcy Code") due to actions by the Commission that made it impossible for it to raise the capital needed to pay for the licenses and put them to use. As was the case with the licenses of NextWave and other PCS spectrum licensees in reorganization, the Commission declared UC-NC's licenses cancelled and re-auctioned them.

While the Commission proceeded, after considerable delay, to consider and deny NextWave's petition for reconsideration of its cancellation of NextWave's licenses, freeing NextWave to appeal the Commission's action to the United States Court of Appeals for the District of Columbia Circuit, have the re-auction decision reversed and receive back its licenses, the Commission has so far refused to decide UC-NC's parallel petition for reconsideration of the cancellation of UC-NC's licenses. Thus, while it is urgent for NextWave to bring an end to this litigation at the earliest date, it is even more urgent, and vital, for UC-NC, and any other small companies in the same position, whose licenses have not yet been restored, that the decision reversing the Commission's cancellation of the licenses be made final by denial of the Petition.

In the accompanying *amicus* brief, UC-NC argues that (1) when a regulatory agency undertakes to engage in arms-length commercial transactions with non-governmental entities, it is subject to the same laws as any other entity engaged in commercial transactions, including the Bankruptcy Code; and (2) no regulatory purpose was served by the Commission's attempted cancellation of the licenses.

WHEREFORE, UC-NC asks that the Court permit UC-NC to submit the accompanying *amicus curiae* brief in support of Respondents.

Respectfully submitted,

PREBEN JENSEN
Counsel of Record
CHARLES E. SIMPSON
DELTON VANDEVER
WINDELS MARX LANE
AND MITTENDORF, LLP
Attorneys for Amicus Curiae
156 West 56th Street
New York, New York 10019
(212) 237-1000

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Interest of *Amicus Curiae*	1
Summary of Argument	5
Argument	6
I. Having Assumed the Roles of Seller and Creditor, the Commission Must Act in Those Roles	6
II. No Regulatory Purpose Was Served by the Commission's Attempted Cancellation of the Licenses	8
Conclusion	14

TABLE OF CITED AUTHORITIES

Page

Cases:

In re Anderson, 279 F. 525 (2d Cir. 1922) 7

In re Minot Auto Co., Inc., 298 F. 853 (8th Cir. 1924) 7

In re Urban Comm-North Carolina, Inc., No. 01-1490 (D.C. Cir.) 3

In re Ward, 131 F. Supp. 387 (D. Colo. 1955) 7

Urban Comm.-North Carolina, Inc. v. FCC, No. 00-1430, 2000 WL 1946634 (D.C. Cir. Dec. 4, 2000) 3

Statutes:

11 U.S.C. § 101, *et seq.* 2, 7

11 U.S.C. § 525 ..... 5, 7, 8

Cited Authorities

Page

Other Authorities:

2 *Collier on Bankruptcy* ¶ 101.10 (Lawrence P. King ed., 15th ed. rev. 2001) 7

145 Cong. Rec. D949-50 (Sept. 8, 1999) 13

145 Cong. Rec. D1166 (Oct. 20, 1999) 13

145 Cong. Rec. H7383-7384 (Aug. 5, 1999) 13

145 Cong. Rec. H10283-01 (Oct. 19, 1999) 13

145 Cong. Rec. H10768 (Oct. 22, 1999) 13

145 Cong. Rec. H10835 (Oct. 25, 1999) 13

145 Cong. Rec. S9046 13

145 Cong. Rec. S9068 13

145 Cong. Rec. S10540 13

H.R. 2670, 106th Cong. (1999) 13

S. 1217, 106th Cong. (1999) 13

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, Urban Comm-North Carolina, Inc. ("UC-NC"), has a special interest in seeing the petition ("the Petition") of the Federal Communications Commission ("the Commission") for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals") denied. UC-NC, just as Respondents herein, NextWave Personal Communications Inc. and NextWave Power Partners Inc. (collectively "NextWave"), is a start-up company which qualified for special financing as a "small business" under the statute and rules governing the auction of spectrum by the Commission. Like NextWave, UC-NC obtained from the Commission at auction[2] broadband

---

1. The Solicitor General, attorney for Petitioner, has given his consent to the filing of this brief and, in compliance with Supreme Court Rule 37.2, his letter of consent has been lodged with the Court. *Amicus* has sought but not obtained the consent of Respondents to the filing of the brief. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party in this case authored this brief in whole or in part and that no monetary contribution to the preparation or submission of this brief was received from any person or entity other than the *amicus curiae* or its counsel.

2. In May of 1996, after 184 rounds of bids, Urban Communicators P.C.S. Limited Partnership ("UCPCS"), the parent of UC-NC's parent, Urban Comm-Mid-Atlantic, Inc., Debtors-in-Possession, was the high bidder at a Commission auction for the right to apply for C Block licenses within ten basic trading areas ("BTAs") in North Carolina. UCPCS's bids, which totaled $74.6 million, were consistent in amount with bids for licenses in similar BTAs throughout the country. UCPCS assigned its C Block license application to UC-NC. The Commission conditionally granted the licenses to UC-NC, which made the required down payment and later executed notes payable to the Commission in the amount of the then outstanding balance.

personal communication services ("PCS") C Block spectrum licenses, and like NextWave, UC-NC was foreclosed due to action taken by the Commission after conclusion of the auction from raising the capital necessary to meet its construction costs and its payment obligations to the Commission, therefore finding it necessary to seek the protection of Chapter 11 ("Chapter 11") of Title 11 of the United States Code ("the Bankruptcy Code").[3] Thereafter, the Commission declared cancelled and scheduled for re-auction first NextWave's and later UC-NC's licenses, as well as those of other small-business licensees, for failure to pay the debts due the Commission.

NextWave and UC-NC both filed petitions with the Commission for reconsideration of the respective cancellation and re-auction notices. The Commission denied NextWave's petition within seven months, enabling NextWave to appeal to the Court of Appeals, which reversed in the decision from which the Commission seeks leave to appeal herein. The Commission, however, has not, fifteen months after the filing of UC-NC's petition for reconsideration and seven months after the Court of Appeals' reversal of the Commission's determination that NextWave's licenses had been cancelled, decided UC-NC's petition for reconsideration,[4] even though under the Court of Appeals' decision in the NextWave action the Commission has no

3. 11 U.S.C. § 101, *et seq.*, as amended.

4. After the Court of Appeals' reversal of the Commission's decision, UC-NC wrote the Commission and its members pointing out the applicability of the NextWave decision to the UC-NC petition and asking that the Commission expedite consideration and grant UC-NC's petition for reconsideration.

choice but to restore those licenses to UC-NC.[5] UC-NC's appeal to the Court of Appeals from the order scheduling UC-NC's license for re-auction was dismissed as incurably premature by the Court of Appeals because of the pendency of UC-NC's petition for reconsideration.[6] Thus, while NextWave has received back its licenses and is able to obtain funds and proceed to build out a system, UC-NC is still without its licenses, with the result that UC-NC is unable to give the assurances it must give to potential investors in order to attract the necessary capital.

The Commission itself has recognized that "[i]n the fast-evolving wireless market, an indeterminate delay to await the final outcome of litigation might be a significant, or

5. It is quite clear that the Commission intends to delay consideration of UC-NC's petition for reconsideration pending proceedings in this Court. The Commission bent every effort to avoid or postpone the restoration of NextWave's licenses, even to the point of asking the Court of Appeals to postpone, pending the Petition, the issuance of the mandate in the NextWave action. The Court of Appeals denied the Commission's request, finding that the Commission did not demonstrate that the Petition "would present a substantial question" and noting that NextWave stipulated to make its plan of reorganization contingent upon a final decision from this Court. *NextWave Pers. Communications Inc. v. FCC*, Nos. 00-1402 & 00-1403, 2001 U.S. App. LEXIS 19617, *4 (D.C. Cir. Aug. 23, 2001).

6. *See Urban Comm-North Carolina, Inc. v. FCC*, No. 00-1430, 2000 WL 1946634 (D.C. Cir. Dec. 4, 2000). After the NextWave decision, UC-NC filed in the Court of Appeals a petition for mandamus directing the Commission to decide UC-NC's petition for reconsideration. That petition is pending. *See* Petition for Writ of Mandamus, *In re Urban Comm-North Carolina, Inc.*, No. 01-1490 (D.C. Cir. filed Nov. 13, 2001).

even crucial blow to future licensees' ability to compete."[7] The NextWave bankruptcy court, referring to this and similar utterances by the Commission, expressed the view it was "self-evident that the same assertion applies equally to in essence a start-up company such as the debtor's which were [*sic*] organized to take advantage of the legislation resulting in the C&FY auctions" and that "there can be no question of the very, very real danger of potential harm to the debtors" flowing from the indefinite delay.[8]

It is likely that, just as NextWave was able to file a second reorganization plan and announce significant outside financing once its C Block licenses were restored, UC-NC will also be able to take advantage of the limited capital funding presently available *if* UC-NC is able to approach the capital markets now, without further delay and with a clear right to the UC-NC Licenses. Denial of the Petition will aid UC-NC in doing so. If the Petition is granted, the resulting delay may foreclose UC-NC from the capital markets forever, considering the continually dimming prospects for the economy and the increased capital needs of larger, more established carriers in the near future.

---

7. Opposition by the Federal Communications Commission to NextWave's Motion for a Stay Pending Judicial Review or for Expedited Consideration at 19, *NextWave Pers. Communications, Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001) (Nos. 00-1402 & 00-1403).

8. Transcript of Motion for Order Approving Grant at 31-32, *In re NextWave Pers. Communications, Inc.*, Ch. 11 Case No. 98 B 21529 (ASH) (Bankr. S.D.N.Y. hearing held on Sept. 5, 2001) (Adlai S. Hardin, Jr., J.).

SUMMARY OF ARGUMENT

The issue framed in the lower court is whether the Commission was precluded from cancelling NextWave's licenses by Section 525(a) of the Bankruptcy Code, 11 U.S.C. § 525(a), which prohibits a governmental unit from revoking a license of a debtor solely because the debtor has not paid a debt dischargeable in the case under the Bankruptcy Code. In the face of that prohibition, the Commission seeks to enforce the language in the license documents conditioning the licenses upon full and timely payment of all monies due and providing for automatic cancellation of the licenses in default of such payment. Petition at 5. It is the Commission's claim that the Court of Appeals' decision nullifying the cancellations under Section 525 of the Bankruptcy Act "dramatically expands the reach of bankruptcy law into an area that Congress has traditionally reserved to the Commission and needlessly transforms Section 525 into an impediment to the regulatory objectives established by Section 309(j)" of Title VII of the United States Code. *Id.* at 13. The Commission also argued below and continues in the Petition to argue that it cancelled the licenses, not "solely" (Section 525(a)) because NextWave did not pay its debt to the Commission, but also because the requirement of full payment for the licenses was an element of the regulatory function the Commission performed in auctioning licenses. *Id.* at 24.

The Court of Appeals held that Section 525 prevented the Commission, whatever its motive — regulatory or not — from cancelling the licenses of winning bidders on the ground that they had failed to make timely installment payments while in Chapter 11. UC-NC submits that the Court of Appeals' holding is a simple application of clear language

of the statute not in need of review by this Court anchored, as it is, in the sound principle that when a regulatory agency undertakes to engage in arms-length commercial transactions with non-governmental entities, it is subject to the same laws as any other entity engaged in commercial transactions, including the Bankruptcy Code. *See* **Point I**, *infra*. In any event, no regulatory purpose was served by the Commission's attempt to cancel the licenses. *See* **Point II**, *infra*.

ARGUMENT

I. Having Assumed the Roles of Seller and Creditor, the Commission Must Act in Those Roles

In selling licenses at their full commercial value and structuring the sale as a typical commercial transaction, the Commission placed itself, in respect of those transactions, on the same plane as other sellers or financiers of goods, services or other things of value. The Commission, by design, adopted the form and substance of an ordinary commercial financed sale. The Commission's actions as a commercial lender give rise to the same set of concerns as other commercial transactions. Among those concerns are the consequences of financial distress experienced by a participant in the process and the need to provide both for the preservation of financially embarrassed but economically viable enterprises and for the protection of *all* their creditors and investors. The Bankruptcy Code provides those protections.

By entering the commercial arena and requiring licensees such as NextWave and UC-NC to pay full commercial value for the PCS licenses and then financing that acquisition, the Commission subordinated itself to the contract and other

laws that regulate the affairs of commercial transactions. The Commission could not responsibly or reasonably have determined that it could serve a regulatory purpose by entering into a full-fledged commercial transaction without also making the determination that it must accept all of the concomitants of a commercial transaction — of which the bankruptcy laws is one. The other participants in the transaction could reasonably expect that the Commission would do so. There is no exemption from the application of the Bankruptcy Code for the government. That is true in all cases[9], and certainly in the instant case, in which the Commission's actions in cancelling licenses is directly addressed by Section 525's prohibition.[10]

9. Section 101(10) of the Bankruptcy Code defines "creditor" to include "an entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10)(A). "[T]he United States is a creditor [within that definition] not only with respect to public exactions for revenue purposes such as income taxes, but also with respect to statutory obligations enforceable by a federal administrative agency in the public interest for the benefit of private parties." 2 *Collier on Bankruptcy* ¶ 101.10 (Lawrence P. King ed., 15th ed. rev. 2001) (footnote omitted). *See In re Anderson*, 279 F. 525, 529 (2d Cir. 1922) (United States foreclosed from collecting tax from bankrupt estate, having failed to file proof of claim; "[t]he United States must file its claim for taxes as any other creditor, if it desires to share in the estate"); *In re Ward*, 131 F. Supp. 387, 395 (D. Colo. 1955) ("[t]he present Act, except as it awards a status of priority, puts the United States in no better position than any other claimant"); *cf. In re Minot Auto Co., Inc.*, 298 F. 853, 856-857 (8th Cir. 1924) (United States bound by provisions of the Bankruptcy Law of 1898).

10. In arguing that payment for the licenses served a regulatory as well as a financial function, the Commisssion refers to the licensees' failure to pay as a breach of a fundamental regulatory (Cont'd)

II. No Regulatory Purpose Was Served by the Commission's Attempted Cancellation of the Licenses

Even if one were to accept the Commission's argument that a "regulatory purpose" behind the cancellations for non-payment could exempt the cancellations from the reach of Section 525, the Court of Appeals' decision would remain sound and not in need of review by this Court. It is clear from the undisputed facts that no regulatory purpose was in fact served by the cancellations.

After the initial auction of the C Block licenses was concluded in May 1996 and the high bidders announced, but before the licenses were issued by the Commission and financing could be obtained, the Commission in June 1996

(Cont'd)

condition of the licenses. "The bids were required and collected not for their own sake," the Commission argues, "but rather because they are the means by which the Commission ensures that the prospective licensee will best use the license in the public interest." Petition at 24. But to say that the licensees' failure to pay the debt interfered with the Commission's regulatory purpose is not to say that the Commission had a reason apart from non-payment of the debt for cancelling the license; it is merely to say that the Commission attached great importance to the failure to pay. The statute, however, does not weigh the importance to the creditor agency of the licensee's failure to pay but in unequivocal language provides that the licensee's failure to pay may not serve as the excuse for cancellation of the license. All licenses issued by governmental entities are issued in pursuance of a regulatory scheme, and the requirement of payment for a license is part of that scheme. If the Commission's argument were to be accepted, the prohibition against the cancellation of the license for payment of a non-dischargeable debt would be meaningless. There is no need for review by this Court of the application by the Court of Appeals of this obvious truism.

announced that it would auction three blocks of spectrum (the D, E and F Blocks) in the same BTAs as, and competing with, the C Block licenses.[11]

The ensuing auctions for additional licenses of PCS spectrum, commencing in August 1996 and ending in January 1997,[12] flooded the market for PCS spectrum and drove down the value of PCS licenses. While the successful bids for C Block licenses had averaged $1.33 per MHz-Pop[13] in the main auction ending May 6, 1996, and $1.94 per MHz-Pop in a re-auction in July 1996, the average of the high bids for the new licenses in the same BTAs for which C Block licenses

---

11. *See FCC v. NextWave Pers. Communications, Inc. (In re NextWave Pers. Communications, Inc.)*, 200 F.3d 43, 47 (2d Cir. 1999), *cert. denied*, 531 U.S. 924 (2000), *reh'g denied*, 531 U.S. 1030 (2000).

12. *See NextWave Pers. Communications, Inc. v. FCC (In re NextWave Pers. Communications, Inc.)*, 235 B.R. 277, 283 (Bankr. S.D.N.Y. 1999), *aff'd*, 241 B.R. 311 (S.D.N.Y. 1999), *rev'd and remanded*, 200 F.3d 43 (2d Cir. 1999), *cert. denied*, 531 U.S. 924 (2000), *reh'g denied*, 531 U.S. 1030 (2000).

13. $/MHz-Pop is a generally accepted industry measurement standard. *See NextWave*, 200 F.3d at 47.

> The MHz, or megahertz of radio frequency, in question determines the carrying capacity of a block of wireless spectrum. . . . One "Pop" represents 1000 persons within the geographic area covered by a particular licensing block. $/MHz-Pop therefore measures the amount paid for a license that would allow the provision of a particular level of communications data to a particular number of people.

Id. at 47 n.4

were granted was only $.33 per MHz-Pop[14]. This difference in the bids in identical markets demonstrates that the Commission, by auctioning additional PCS spectrum immediately after the C Block auctions closed, had drastically depressed the market value of all such licenses. Predictably, the C Block licensees found that, in light of the disparate values placed on equivalent PCS spectrum licenses, financing for the licenses and the build-out of their PCS systems could not be obtained. In the words of United States Bankruptcy Judge Adlai S. Hardin, Jr.,

> NextWave was not the only C block licensee to find the public capital markets closed. Approximately $1.6 billion of public financing was sought by C block licensees after the award of their licenses. Not one dollar of this $1.6 billion was raised in the public market. To this date [May 1999], nearly three years after the 1996 auction and reauction, less than 10% of the C block licenses awarded by the Commission have been placed in service.[15]

The Commission, recognizing its error, decreed a payment moratorium in order to determine how to remedy the situation it had created. After the expiration of the payment moratorium, however, the Commission decided to insist upon full payment of auction bids for any licenses the license holders chose to keep.[16] The licenses for which the holders, for the reasons mentioned above, were unable to make full and timely payment (a significant portion of those awarded) were scheduled by the Commission for re-auction.

---

14. *NextWave*, 235 B.R. at 284.

15. *Id.* at 286.

16. Petition at 6-7.

Notwithstanding the Commission's strenuous argument that the defaulting licensee's failure to pay the installments when due demonstrates their unsuitability as C Block licensees, the plain fact is that the inability of NextWave and those standing in the same position as NextWave to pay the bid prices for the licenses had nothing to do with their potential efficiency in utilization of the licenses but had everything to do with the Commission's conduct subsequent to the original C Block auctions. The C Block licensees failed to raise the necessary financing because the Commission had not been sensitive to the needs of the winning bidders to go into the public markets to raise the necessary capital, a fact inherent in the very criteria by which they were chosen.

When it auctioned the C Block licenses to minimally capitalized start-up companies and allowed for installment financing of the winning bids, the Commission knew or should have known that, by definition, the ability of the winning bidders to pay (*i.e.*, raise the necessary capital in a competitive capital market) would wax and wane with the volatile market for public financing. Nonetheless, the Commission proceeded to conduct subsequent auctions of PCS spectrum with complete disregard of that fact and scheduled subsequent auctions in a manner that virtually assured that the C Block bidders would be unable to raise the necessary capital. The inability to raise the necessary capital would have been the likely experience of any small business meeting the eligibility criteria for the C Block licenses and was, in fact, the experience of virtually all of those who did bid successfully. It is not in keeping with the facts, then, for the Commission to argue that the Court of Appeals' decision "transfers the licenses to entities that value the spectrum less highly." Petition at 13. It was the market that valued the spectrum less highly, and it did so because of the devaluation the spectrum had suffered as a direct consequence of the Commission's actions.

The Commission understands full well that the arguments it has advanced in its litigation with C Block licensees do not hold up. It has lobbied Congress extensively during the pendency of this litigation to obtain the exception from the Bankruptcy Code for its actions as a commercial lender that it claims to possess already and has sought retroactive application of the statute it has proposed for the purpose[17] in

17. [Proposed] SEC. 618. Section 309(j)(8) of the Communications Act of 1934 is amended by adding new paragraph (D) as follows:

(D) PROTECTION OF INTERESTS. —

(i) Title 11, United States Code, or any otherwise applicable Federal or state law regarding insolvencies or receiverships, or any succeeding Federal law not expressly in derogation of this subsection, shall not apply to or be construed to apply to the Commission or limit the rights, powers, or duties of the Commission with respect to (a) a license or permit issued by the commission under the subsection or a payment made to or a debt or other obligation owed to the Commission relating to or rising from such a license or permit, (b) an interest of the Commission in property securing such a debt or other obligation, or (c) an act by the Commission to issue, deny, cancel, or transfer control of such a license or permit.

(ii) Notwithstanding otherwise applicable law the Commission shall be deemed to have a perfected, first priority security interest in a license or construction permit issued by the Commission under this subsection and the proceeds of such a license or permit for which a debtor or other obligation is owed to the commission under this Subsection.

(Cont'd)

order to nullify the actions brought by C Block licensees. On each occasion, Congress refused to grant the exception the Commission sought.[18]

(Cont'd)

(iii) This paragraph shall apply retroactively, including to pending cases and proceedings whether on appeal or otherwise.

S. 1217, 106th Cong. § 618 (1999).

18. The proposed amendment (footnote 16, *supra*) was included in S. 1217, a fiscal year 2000 appropriation bill for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies, which was passed by the Senate on July 22, 1999. *See* 145 Cong. Rec. S9068 (July 22, 1999). Under unanimous-consent agreement, S. 1217 was not engrossed but ordered to be held until the House companion measure, H.R. 2670, was received, and once received H.R. 2670 was to be amended by striking everything after the enacting clause and inserting S. 1217 in lieu thereof, and upon passage of the amended version of H.R. 2670 by the Senate, S.1217 was to be vitiated and indefinitely postponed. *See* 145 Cong. Rec. S9046 (July 22, 1999). The Senate passed its amended version of H.R. 2670 on September 8, 1999, and passage of S. 1217 was subsequently vitiated and indefinitely postponed. *See* 145 Cong. Rec. S10540 (September 8, 1999); 145 Cong. Rec. D949-50 (September 8, 1999). The House version of H.R. 2670, which was passed on August 5, 1999, *see* 145 Cong. Rec. H7383-7384 (August 5, 1999); 1999 House Roll No. 387, did not contain the provision. The two versions of H.R. 2670 went to conference, and the provision was not included in the resultant conference report, *see* 145 Cong. Rec. H10283-01 (Oct. 19, 1999) (H. Rept. 106-398), which was agreed to by both the House and Senate on October 20, 1999, *see* 145 Cong. Rec. D1166 (October 20, 1999). The enrolled bill was presented to the President on October 22, 1999, *see* 145 Cong. Rec. H10768 (October 22, 1999), and vetoed for sundry reasons on October 25, 1999, *see* 145 Cong. Rec. H10835 (October 25, 1999).

CONCLUSION

For the reasons stated above, UC-NC submits that the Petition should be denied.

Respectfully submitted,

PREBEN JENSEN
Counsel of Record
CHARLES E. SIMPSON
DELTON VANDEVER
WINDELS MARX LANE
AND MITTENDORF, LLP
Attorneys for Amicus Curiae
156 West 56th Street
New York, New York 10019
(212) 237-1000

Nos. 01-653, 01-657

FILED
SEP 2 0 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORP., *et al.*,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS NEXTWAVE PERSONAL COMMUNICATIONS INC. AND NEXTWAVE POWER PARTNERS INC.

THOMAS G. HUNGAR
DOUGLAS R. COX
MIGUEL A. ESTRADA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

DONALD B. VERRILLI, JR.
Counsel of Record
IAN HEATH GERSHENGORN
WILLIAM M. HOHENGARTEN
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Suite 1200 South
Washington, DC 20005
(202) 639-6000

Counsel for Respondents

[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

G. ERIC BRUNSTAD, JR.
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, CT 06103
(860) 240-2700

DEBORAH L. SCHRIER-RAPE
SCHRIER-RAPE, P.C.
5929 Westgrove Drive
Dallas, TX 75248
(972) 818-6761

FRANK A. CASSOU
MICHAEL WACK
NEXTWAVE TELECOM INC.
601 Thirteenth Street, N.W.
Suite 320 North
Washington, DC 20005
(202) 661-2082

SUPPLEMENTAL BRIEF

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. ("NextWave") respectfully submit this supplemental brief pursuant to S. Ct. Rule 25.5, to address the relevance of a Public Notice issued by the Federal Communications Commission ("FCC") on September 12, 2002, proposing to allow the high bidders at the reauction of NextWave's licenses to renounce their bids.[1]

As recently as its opening brief in this case, the FCC had insisted that the principle of "auction integrity" required the winning bidders at the reauction of NextWave's licenses "to pay the full amount of their winning bids or be subject to default payments." FCC Br. at 12 n.6 (citation omitted). In the September 12th Public Notice, however, the FCC has reversed itself. Notwithstanding that the reauction bidders were on notice that the instant litigation might delay or defeat their ability to obtain NextWave's licenses,[2] the FCC now proposes to release those bidders from their bid obligations. The first proposal in the Public Notice gives winning bidders a period of time to renounce all their bids and obtain a full refund. The second allows winning bidders

---

[1] Public Notice, *Commission Seeks Comment on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to NextWave Personal Communications Inc., NextWave Power Partners, Inc. and Urban Comm – North Carolina, Inc.*, WT Docket No. 02-276, FCC 02-248 (rel. Sept. 12, 2002) (SA1-SA12) ("Public Notice").

[2] *See* Public Notice at 2 (observing that bidders knew the reauction was contingent on "final outcome of the *NextWave* litigation") (SA4); *see also* Public Notice, *C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000, Rescheduled for December 12, 2000*, 15 F.C.C.R. 17251, 17255-56 (2000) ("Potential bidders and interested parties should be aware that . . . . certain judicial proceedings that may relate to the licenses available in Auction No. 35 are pending . . . . [T]he auction is subject to such matters").

to affirm their bids for some individual market licenses and to renounce others. *See* Public Notice at 4 (SA6-7). These options are offered not merely to smaller businesses that qualify as "designated entities" under the FCC's rules, but also to Verizon, Voicestream, and other telecommunications giants whose winning bids constitute most of the 15.7 billion dollars bid for NextWave's licenses at reauction.

The FCC's justifications for granting such relief are telling. According to the Public Notice, "the state of the capital markets for entities . . . engaged in the provision of wireless telecommunications services . . . has continued to decline rapidly," and "troubling financial circumstances have led to difficulties in accessing capital and other problems for companies of all sizes." *Id.* at 3 (SA5). The Public Notice also acknowledges something the FCC has previously refused to admit in this litigation: "market downturns affect the value of spectrum licenses won at auctions and licensees' (or applicants') ability to meet auction payment obligations." *Id.* The Public Notice thus recognizes that, as a result of marketwide forces beyond the control of any individual bidder, even the nation's largest telecommunications companies can encounter difficulties accessing capital to meet their obligations.

Those justifications contradict the FCC's central themes in this case. Until now, the FCC has maintained that the protections of the Bankruptcy Code, and § 525 in particular, which assist debtors to work through temporary downturns in the capital markets, should not be enforced because they imperil "auction integrity." That argument is wrong because § 525 must be enforced as written irrespective of any contrary policy preferences the FCC might have. But the Public Notice makes clear just how empty the FCC's policy rationale is.

As the FCC's change of position illustrates, the integrity of auctions as a mechanism for allocating spectrum is not undermined by virtue of the fact that subsequent market changes may sometimes adversely affect a licensee's financial circumstances. Such intervening developments do not call the initial allocation into question. They are merely facts of life in a market economy, and the bankruptcy laws are designed to give the licensee a fair opportunity to weather such difficulties and remain in operation. Over the past decade, licensees that paid for their licenses up front – using funds borrowed in the private marketplace – have been forced to seek the protections of Chapter 11 due to adverse financial conditions. But the FCC, in such circumstances, has never raised concerns about "auction integrity" or challenged the allocation of those licenses. The result can be no different when the FCC steps in to provide the financing.[3] The auction mechanism has worked equally well in both situations to allocate the licenses, and normal marketplace mechanisms – including the bankruptcy laws – accommodate subsequent market downturns or other developments that create difficulties for licensees in meeting their financing obligations. Further, the FCC's interest in ensuring efficient use of the spectrum is protected by its "build out" regulations, which require C and F block licensees to build their networks within five years of obtaining licenses. 47 C.F.R. § 24.203.

The fact is that spectrum values are volatile, and the willingness of the capital markets to finance spectrum fluctuates. This is true even for behemoths such as Verizon,

---

[3] *See In re Implementation of Section 309(j) of the Communications Act Competitive Bidding*, 8 F.C.F.R. 7635, ¶ 69 (1993) (noting that FCC would "extend credit" to C and F block licensees, that installment payments would "reduce the amount of private financing needed by a prospective licensee," and would "burden[] the government with the risk of default").

but it is even more true for the entrepreneurial businesses with limited capital that qualify as "designated entities."[4] And it is precisely in the context of volatile markets and capital intensive businesses that the Bankruptcy Code performs its most important role, cushioning the blow of temporary downturns and, as Congress intended, helping small and large businesses alike to avoid the economic and social disruption that attends liquidation. Thus, the very reasons the FCC gives in the Public Notice for providing relief to the reauction winners support enforcing the Bankruptcy Code as written in this case.

[4] The fact that Verizon and the other bidders in Auction 35 were relying on private financing to fund their license payments does not justify a different standard of "auction integrity." This is especially true in light of the fact that the FCC proposes to release the Auction 35 bidders from their bids, while the NextWave reorganization would have paid the FCC in full.

CONCLUSION

For the foregoing reasons, as well as those set forth in the brief for respondents, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

THOMAS G. HUNGAR
DOUGLAS R. COX
MIGUEL A. ESTRADA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

DONALD B. VERRILLI, JR.
Counsel of Record
IAN HEATH GERSHENGORN
WILLIAM M. HOHENGARTEN
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

G. ERIC BRUNSTAD, JR.
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, CT 06103
(860) 240-2700

FRANK CASSOU
MICHAEL WACK
NEXTWAVE TELECOM INC.
411 W. Putnam Avenue
Greenwich, CT 06830
(914) 345-1100

DEBORAH L. SCHRIER-RAPE
SCHRIER-RAPE, P.C.
5929 Westgrove Drive
Dallas, TX 75248
(972) 818-6761

Counsel for Respondents

SEPTEMBER 20, 2002

MOTION FILED
SEP 2 0 2002

(19) (16)

Nos. 01-653, 01-657

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORP., *et al.*,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

SUPPLEMENTAL APPENDIX

THOMAS G. HUNGAR
DOUGLAS R. COX
MIGUEL A. ESTRADA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

DONALD B. VERRILLI, JR.
Counsel of Record
IAN HEATH GERSHENGORN
WILLIAM M. HOHENGARTEN
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Suite 1200 South
Washington, DC 20005
(202) 639-6000

Counsel for Respondents

[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

51

G. ERIC BRUNSTAD, JR.
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, CT 06103
(860) 240-2700

DEBORAH L. SCHRIER-RAPE
SCHRIER-RAPE, P.C.
5929 Westgrove Drive
Dallas, TX 75248
(972) 818-6761

FRANK A. CASSOU
MICHAEL WACK
NEXTWAVE TELECOM INC.
601 Thirteenth Street, N.W.
Suite 320 North
Washington, DC 20005
(202) 661-2082

Index

Page

Public Notice, *Commission Seeks Comment on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to NextWave Personal Communications Inc., NextWave Power Partners, Inc. and Urban Comm – North Carolina, Inc.*, WT Docket No. 02-276, FCC 02-248 (rel. Sept. 12, 2002) 1

In re Amendment to the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, 12 F.C.C.R. 16436 (1997) 13

In re Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, 13 F.C.C.R. 374 (1997) 132

In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, 13 F.C.C.R. 8345 (1998) 367

In re Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, 13 F.C.C.R. 22071 (1998) .. 466

In re Request for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, 14 F.C.C.R. 6080 (1999) ... 479

Letter from Thomas Gutierrez, Lukas, McGowan, Nace & Gutierrez, Charted *et al.* to Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, FCC of March 13, 1997 491

Memorandum of Law in Support of FCC's Motion to Lift Automatic Stay, *In re NextWave Personal Communications, Inc.*, No. 98 B 21529 (S.D.N.Y. Bankr. filed May 28, 1999) 499

Brief of Respondents/Appellees, *NextWave Personal Communications Inc. v. FCC*, Nos. 00-1402 and 00-1403 (D.C. Cir. filed March 15, 2001) 503

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
445 TWELFTH STREET, NW
WASHINGTON, D.C. 20554 FCC 02-248

News media information 203/418-0500 Fax-On-Demand 202/418-2830
Internet: http://www.fcc.gov Flp.fcc.gov

Released: September 12, 2002

COMMISSION SEEKS COMMENT ON DISPOSITION OF DOWN PAYMENTS AND PENDING APPLICATIONS FOR LICENSES WON DURING AUCTION NO. 35 FOR SPECTRUM FORMERLY LICENSED TO NEXTWAVE PERSONAL COMMUNICATIONS INC., NEXTWAVE POWER PARTNERS, INC. AND URBAN COMM -- NORTH CAROLINA, INC.

WT Docket No. 02-276

Auction Event No. 35

Comment Date: October 11, 2002
Reply Comment Date: October 21, 2002

BACKGROUND

On March 26, 2002, the Commission granted partial refunds of the down payments made by certain winning bidders in Auction No. 35.[1] These winning bidders had made down payments and filed long-form applications for spectrum

---

[1] Requests for Refunds of Down Payments Made In Auction No. 35, *Order*, FCC 02-99 (rel. Mar. 27, 2002) ("*Partial Refund Order*").

associated with licenses that had previously been issued to NextWave Personal Communications Inc., NextWave Power Partners Inc. (collectively "NextWave") and Urban Comm-North Carolina, Inc. ("Urban Comm"). This spectrum, as well as Auction No. 35, continues to be the subject of extensive litigation and pending regulatory proceedings.[2] Key issues over the effectiveness of the Commission's automatic cancellation rules with respect to NextWave's licenses are scheduled for oral argument before the Supreme Court on October 8, 2002.[3]

Pursuant to the *Partial Refund Order*, the Commission has already refunded approximately $2.8 billion to the Auction No. 35 winning bidders who have not yet received their licenses, but it retained an amount equal to three percent of the net

---

[2] *NextWave Personal Communications Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *cert. granted*, __ U.S. __, 70 U.S. L.W. 3317, 70 U.S.LW. 3545, 70 U.S.L.W. 3351 (March 4, 2002) (Nos. 01-653, 01-657); *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999); *Cellco Partnership d/b/a Verizon Wireless v. FCC*, D.C. Cir. No. 02-1110 (filed April 8, 2002); *Cellco Partnership d/b/a Verizon Wireless v. United States*, C.F.C. No. 02-280c (filed April 5, 2002); *In re Urban Comm-North Carolina, Inc.*, Case No. 98-B-10086 (REG), Adv. Proc. No. 99/8125A; Applications for Review, dated March 17, 1997 and June 16, 1997, filed by Antigone Communications, L.P. and PCS Devco, Inc.; Petition to Initiate an Investigation and Audit Regarding the Eligibility of NextWave Personal Communications, Inc. and NextWave Power Partners Inc. to Hold C and F Block licenses, filed by Alaska Native Wireless, L.L.C., Verizon Wireless, and VoiceStream Wireless Corporation, dated July 19, 2001; Petition for Reconsideration, filed by Alaska Native Wireless, L.L.C. and VoiceStream Wireless Corporation, dated October 12, 2001; Petition to Deny Reinstatement of Licenses, filed by Alaska Native Wireless, L.L.C., and VoiceStream Wireless Corporation, dated August 30, 2001.

[3] *See FCC v. NextWave Personal Communications Inc.*, *cert. granted*, __ U.S. __, 70 U.S.L.W. 3317, 70 U.S.L.W. 3545, 70 U.S.L.W. 3551 (U.S. March 4, 2002) (Nos. 01-653, 01-657).

winning bids for these licenses and maintained the pending status of the applications for these licenses. The total amount still on deposit with the Commission is $489,548,061. The total amount of these Auction No. 35 winners' obligations, including the refunded down payments, to the government for the former NextWave and Urban Comm licenses won at the auction is $16,318,268,700. The Commission has already received $504,419,150 in final payments for other licenses won and granted based on Auction No. 35.

As noted in the *Partial Refund Order*, the Commission was sympathetic to the needs of the auction winners, many of whom are small businesses, to have access to their funds to continue to operate their businesses. At the same time, the Commission held that it must protect the integrity of Auction No. 35 in the event the Commission is ultimately successful in its litigation. It therefore struck a balance between the hardship that would be imposed by continuing to retain the entirety of the down payments and the need to protect the integrity of the auction. Accordingly, it refunded to the payors of record a substantial portion of the monies on deposit.

However, the Commission's *Partial Refund Order* also found, *inter alia*, that the continued litigation associated with particular licenses *did not* relieve the winning bidders of the obligation to pay their full bid amounts for licenses won in Auction No. 35. In this regard, the Commission disposed of matters raised by Verizon in a letter to the Commission's Deputy General Counsel in which Verizon argued that it no longer had an obligation to pay the amount it bid in Auction No. 35 based on the theory that spectrum auctions create contractual relationships between the Commission and winning bidders, and that the Commission's failure to make timely

delivery of the licenses rendered the contract void.[4] No other Auction No. 35 applicant advanced this contract theory. In response to Verizon's letter, the *Partial Refund Order* stated that auctions are a regulatory mechanism for distributing licenses and that the relationship between the Commission and winning bidders of spectrum licenses is governed by the Communications Act, the Commission's competitive bidding regulations, and Public Notices setting forth specific conditions on particular auctions. Those conditions, the Commission stated, included the auction's contingency on the "final"outcome of the *NextWave* litigation.[5] Therefore, the Commission held that the fact that spectrum associated with the former NextWave licenses was not yet available for use by the Auction No. 35 winning bidders did not require the Commission to relieve Verizon of its bid obligations.[6]

Verizon challenged the Commission's *Partial Refund Order* in two courts.[7] In the D.C. Circuit, in case No. 02-1110, Verizon seeks a ruling that the delay in licensing caused by the NextWave litigation entitles Verizon to declare its auction obligations void. In the Court of Federal Claims, in case No.

---

[4] *Partial Refund Order* at 9-10, ¶ 14-16.

[5] *Id.* at 9, ¶ 15.

[6] *Id.* at 9, ¶ 16.

[7] *See Cellco Partnership d/b/a Verizon Wireless v. FCC*, D.C. Cir. No. 02-1110 (filed April 8, 2002); *Cellco Partnership d/b/a Verizon Wireless v. United States*, C.F.C. No. 02-280c (filed April 5, 2002). The case pending in the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") is at the briefing stage – Verizon Wireless's opening brief is due November 22, 2002, followed by the FCC's brief on January 8, 2003, and Verizon's reply on February 6, 2003. Oral argument is scheduled for April 15, 2003. In the case pending before the Court of Federal Claims, the government has requested that this case be held in abeyance pending disposition by the D.C. Circuit of the related case and the Supreme Court of the NextWave case.

02-280c, Verizon seeks a declaration nullifying Auction No. 35 as well as consequential damages. We stand by our legal conclusions in the *Partial Refund Order*, and do not through this Public Notice suggest any support for Verizon's legal argument.

DISCUSSION

Since the Commission issued its *Partial Refund Order* several months ago, the state of the capital markets for entities, including the applicants, engaged in the provision of wireless telecommunications services, as well as other telecommunications services, has continued to decline rapidly. Specifically, since March, the Commission has received submissions asserting that unique and troubling financial circumstances have led to difficulties in accessing capital and other problems for companies of all sizes, which in turn has affected the customers they serve.[8] For instance, these commenters suggest that the impact of continuing contingent liabilities on credit ratings in the midst of a severe downturn in capital markets could potentially frustrate other policy objectives as well as quality of service. Moreover, as we have seen in the past,[9] market downturns affect the value of spectrum licenses won at auction and licensees' (or applicants') ability to meet auction payment obligations. At the same time, the Commission remains concerned about protecting the integrity

---

[8] *See* Letter to Michael K. Powell, Chairman, FCC, from Peter C. Crampton, *et al.*, at p.2 (Aug. 16, 2002); *See also* Letter to Michael K. Powell, Chairman, FCC, from Thomas E. Wheeler, Cellular Telecommunications & Internet Assoc., at p. 2 (Aug. 13, 2002).

[9] *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 12 FCC Rcd 16,436 (1997) (*C Block Restructuring 2nd R &O*), *on recon.* 13 FCC Rcd 8345 (1998) (*Recon. of C Block Restructuring 2nd R & O), aff'd, U.S. Airwaves Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000).

of its spectrum auction program.[10] Concerns about the state of the capital markets must be balanced against this important public interest consideration.

Taking official notice of the status of the capital markets and other economic events, the Commission, on its own motion, seeks comment on the observations in the paragraph above and whether it should take further action with regard to the pending applications for licenses won during Auction No. 35 for spectrum formerly licensed to NextWave and Urban Comm.

Specifically, we seek comment on whether we should consider further, *inter alia*, the following scenarios:

(1) Full Refund and Option to Dismiss All Pending Applications. Upon request, the Commission would refund to the payor of record the full amount of monies on deposit with the Commission for the licenses subject to the NextWave litigation and Urban Comm proceedings. The Commission would also provide a period of time for individual applicants to request voluntary dismissal of all of their applications, with prejudice.

Under this scenario, applicants obtaining a full refund and choosing to dismiss their applications would lose all claims to the affected Auction No. 35 licenses.[11] Should the Commission prevail in the litigation, new initial licenses for the spectrum would be assigned by auction at a future date. In addition, the Commission would waive,

---

[10] *C Block Restructuring 2nd R &O* , 12 FCC Rcd 16,436, ¶ 2-3 (1997).

[11] In addition to relinquishing any and all claims on the Auction No. 35 licenses, the bidder would also be required to release any other claims against the United States and the FCC arising out of Auction 35.

in whole or part, its default rules for these licenses and, subject to coordination with the Department of Justice pursuant to applicable federal claims collection standards,[12] forgive the debt incurred on them at Auction No. 35. We seek comment on whether it would be advisable to waive the default rules, or to extend debt forgiveness, in whole or in part, to a bidder opting for dismissal of its application(s). In addition, we seek comment on whether a bidder receiving a waiver or debt forgiveness should be barred from participating in the reauction of the licenses or otherwise obtaining such licenses for a period of time.[13] Finally, we seek comment on whether applicants that would like to keep their applications pending should reaffirm their commitment to their Auction No. 35 obligations or just remain silent.

(2) Selective Opt-Out for Pending Applications. The Commission would grant individual applicant requests for voluntary dismissal of their applications, with prejudice, for certain licenses and not others.

Under this scenario, the Commission would provide applicants the opportunity to pick and choose licenses for which to keep the applications pending and which to

---

[12] *See* 4 C.F.R. Parts 101-105; *C Block Restructuring 2nd R &O*, 12 FCC Rcd 16436, ¶ 53-58 (1997); *U.S. Department of Justice Approves Debt Forgiveness for Personal Communications Services (PCS) C Block*, DA 98-1051, Public Notice (June 3, 1998).

[13] We note that in the C-block debt restructuring proceeding, licensees that surrendered licenses pursuant to the various options, under certain circumstances, were deemed ineligible to reacquire their surrendered licenses through reauction or by any other means for a period of two years from the start date of the next reauction. *Recon. of C Block Restructuring 2nd R & O*, 13 FCC Rcd 8345, ¶ 37 (1998).

dismiss.[14] We seek comment on whether all of the down payments should be refunded or only down payments associated with the dismissed licenses. As with the above scenario, applicants choosing to dismiss their applications would lose all claims to the affected licenses. Should the Commission prevail in the litigation, new initial licenses for the spectrum would be assigned by auction at a future date. In addition, the Commission would, in whole or part, waive its default rules for dismissed license applications and, subject to coordination with the Department of Justice pursuant to applicable federal claims collection standards, forgive the debt on them incurred at Auction No. 35. Again, we seek comment on whether a bidder opting for dismissal of its application(s) and receiving a full or partial waiver of the default payment rules should be barred from participating in the reauction of the licenses or otherwise obtaining such licenses for a period of time.

Although the oral argument in the Supreme Court case is fast approaching and the Commission has the utmost confidence in the merits of its case, the Commission and winning bidders in Auction No. 35 still face the possibility of prolonged litigation over such licenses during uncertain and trying economic conditions. We also recognize that should the Supreme Court rule in the government's favor, there may nevertheless be unresolved issues over the licenses, that would prolong the litigation. Depending on the length of the delay, capital market conditions may continue to change, increasing the possibility that winning bidders in Auction 35 will be in a significantly different position that at the time of the auction. Accordingly, we seek comment on the scenarios discussed above based on the changed circumstances since issuance of our *Partial Refund Order*. We also seek comment on whether

[14] *Id.* at ¶¶ 34-37.

granting relief under any of the options discussed herein would promote or disserve the public interest objectives outlined in Section 309(j) of the Communications Act, including "promoting economic opportunity and competition" and ensuring "efficient and intensive use of the electromagnetic spectrum."[15]

PROCEDURAL MATTERS

Pursuant to 47 C.F.R. § 1.1200(a), the Commission may adopt modified *ex parte* procedures in particular proceedings if the public interest so requires. Accordingly, issues related to this Public Notice will be governed by "permit-but-disclose" *ex parte* procedures that are applicable to non-restricted proceedings under 47 C.F.R. § 1.1206.[16] Designating this matter as "permit but disclose" will provide an opportunity for all interested parties to comment on the policy questions concerning the treatment of the funds on deposit. All other matters concerning Auction No. 35 applications that are the subject of NextWave's Petition to Defer[17] and other petitions to deny remain restricted, pending further action by Public Notice.

Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before September 30, 2002, and reply

[15] 47 U.S.C. § 309(j)(3)(B) & (D).

[16] Parties making oral ex parte presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subject discussed. More than a one or two sentence description of the views and arguments presented generally is required. *See* 47 C.F.R. § 1.1206(b)(2).

[17] NextWave's Petition to Defer or, in the Alternative, to Condition Grant (filed March 9, 2001); Reply Comments of Verizon Wireless (filed March 16, 2001).

comments on or before October 15, 2002. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Marlene H. Dortch, Secretary, Office of the Secretary, Federal Communications

Commission.

Action by the Commission on September 11, 2002: Chairman Powell, Commissioners Abernathy and Martin with Commissioner Copps concurring and issuing a statement.

FEDERAL COMMUNICATIONS
COMMISSION

Marlene H. Dortch
Secretary

CONCURRING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

RE: Commission seeks comment on disposition of down payments and pending applications for licenses won during Auction No. 35 for spectrum formerly licensed to NextWave Personal Communications Inc., NextWave Power Partners, Inc. and Urban Comm – North Carolina, Inc. (Auction Event No. 35)

I believe that there are strong equitable arguments to support returning the remaining funds on deposit related to Auction 35, and even for dismissing all pending applications related to that auction. But I am frankly somewhat concerned about the timing of today's Public Notice, as drafted. I have been in this town long enough to know that there is something called the Law of Unintended Consequences, and I never underestimate its power. I must, therefore, concur rather than approve of this action.

Federal Communications Commission FCC 97-342

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of the Commission's	)	WT Docket No. 97-82
Rules Regarding Installment	)	
Payment Financing For Personal	)	
Communications Services (PCS)	)	
Licensees	)	

Second Report and Order and
Further Notice of Proposed Rule Making

Adopted: September 25, 1997 Released: October 16,1997

Comments Due: November 13, 1997
Reply Comments Due: November 24, 1997

By the Commission: Chairman Hundt affirming and dissenting in part and issuing a statement; Commissioner Quello issuing a separate statement at a later date, Commissioners Ness and Chong issuing separate statements.

I. INTRODUCTION

1. By this *Second Report and Order*, we order resumption of installment payments for the broadband Personal Communications Services (PCS) C and F blocks, with the payment deadline reinstated as of March 31, 1998. We adopt disaggregation, amnesty, and prepayment options designed to

assist C block licensees experiencing financial difficulties to build systems that will promote competition or surrender spectrum to the Commission for reauction. These provisions will create opportunities to provide service to the public while maintaining the fairness and integrity of our auctions program. We seek comment on proposed changes to our C block rules to govern the reauction of surrendered spectrum in the C block in the accompanying *Further Notice of Proposed Rule Making*.

II. EXECUTIVE SUMMARY

2. The extraordinary procedures we adopt today apply to all C block licensees. In considering the many options presented, which range from merely enforcing our existing rules to completely rewriting our rules after the auctions closed, we have considered and balanced the following policy goals.

- Maintaining the integrity of the Commission's rules and auction processes.

- Ensuring fairness to all participants in our auctions, including those who won licenses in the auctions and those who did not, as well as licensees in competing services.

- Resolving issues now in a manner that does not merely postpone the problem.

- Complying with the mandate of our auction authority in Section 309(j) of the Communications Act of 1934, as amended ("Communications Act"), that we ensure "that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants,

including small businesses . . ."[1]

- Promoting economic opportunity and competition in the marketplace.[2]

3. Maintaining the integrity of our rules and auction processes in an essential goal. As Senator John McCain observed on September 18, the Balanced Budget Act mandates a series of future spectrum auctions, and the Commission's decisions on C block must not "adversely impact the integrity of the auction process or the confidence that parties would have in the stability of the Commission's auction rules."[3] We are not looking to maximize revenues, but to maintain the integrity for all of our future auctions and to ensure that all participants are treated fairly and impartially. These elements are essential if the financial community is to have the stability it requires to fund the new communications enterprises and services for which this spectrum should be used.

4. We conclude that it is in the public interest to immediately adopt provisions to facilitate use of C block licenses without further regulatory or marketplace delay. Certainty is beneficial to all C block licensees and will foster the increased competition we expect in the marketplace. Many small licensees bid amounts comparable to those of other PCS spectrum, yet are being delayed in acquiring financing for their construction while these matters are pending before the Commission. Some of the larger licensees also find that they can move forward only when we settle the regulatory issues.

---

[1] *See* 47 U.S.C. § 309(j)(3)(B). *See also* 47 U.S.C. § 309(j)(4)(D).

[2] *See* 47 U.S.C. §§ 309(j)(3)(A), (B).

[3] The Honorable John McCain, *ex parte* letter, September 18, 1997.

Our actions today are intended to restore regulatory certainty to the marketplace.

5. Consistent with our goals, we have rejected a number of restructuring proposals that would have dramatically changed the amount bid for licenses, and instead offer relief that is more modest in nature. Our menu approach is intended to provide options to facilitate the rapid introduction of service to the public, while recognizing that ultimately the decisions concerning competition and services appropriately are marketplace decisions and should not be determined by government intervention. Our decisions are intended to be fair to current C block licensees, to bidders who were not successful in their attempts to obtain licenses in this spectrum, and to the public desiring new and innovative competitive services.

6. On March 31, 1997, in response to a joint request from several C block licensees seeking to modify their existing installment payment obligations, and because of other debt collection issues, the Wireless Telecommunications Bureau ("Bureau") suspended the deadline for payment of all C block installment payments.[4] On April 28, 1997, the Bureau extended the suspension to F block licensees.[5] We rescind the suspension of payments, effective March 31, 1998. On that date, all F block licensees must resume payments under their original Installment Payment Plan Note (hereinafter in the singular, "Note" and in the plural, "Notes"). Any C block

---

[4] *See* Installment Payments for PCS Licenses, Order, DA 97-649 (rel. March 31, 1997).

[5] *See* "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block Licenses," *Public Notice*, DA 97-883 (rel. April 28, 1997) at 2.

licensee may elect to continue making payments under its Note(s) or may elect one of three options described below. These three options are designed to provide limited relief for C block licensees having difficulty meeting their financial obligations to the Commission while maintaining the fairness and integrity of our auctions program. The election must be made no later than January 15, 1998. Any C block licensee that fails to elect on a timely basis either to continue under its existing Note or one of the available options, will be held to strict adherence with the terms of its existing Note(s). The options are as follows:

- ***Disaggregation.*** Any C block licensee may elect to disaggregate one- half of its spectrum (15 MHz of its 30 MHz) and surrender such spectrum to the Commission for reauction. A licensee must disaggregate spectrum for *all* of the Basic Trading Area (BTA) licenses it holds within any Major Trading Area (MTA), but need not disaggregate the licenses it holds in other MTAs. In return, the licensee will have the proportionate amount, *i.e.*, 50%, of its down payment on such licenses forgiven. Fifty percent of the down payment for those licenses will be applied towards the debt for the retained spectrum; the licensee will not get a refund or credit of the other 50% of its deposit. The licensee will be prohibited from rebidding for this spectrum, or otherwise acquiring it in the secondary market, for two years from the date of the start of the reauction. C block licensees electing this option will repay over eight equal payments (beginning with the payment due on March 31, 1998) all interest that has accrued and was unpaid due to the payment suspension, adjusted to reflect the reduction in debt obligation. Any prior installment payments made will be credited in full against those amounts.

- ***Amnesty.*** Any C block licensee may surrender *all* of its

licenses, and in return will have all of its outstanding C block debt forgiven. The single exception to the "all-or-nothing" requirement for a grant of amnesty applies to licensees that met or exceeded the five-year build-out requirement by September 25, 1997. Those licensees meeting this build-out exception may retain their built-out BTAs, but must also keep the other BTAs in the MTA where the build-out requirement has been met. The licensee choosing the amnesty option will not have its down payment amounts returned. All installment payments made will be refunded or applied to previously accrued interest for retained markets, subject to applicable federal debt collection laws. The licensee may bid on any of its surrendered licenses or any other licenses in the reauction, and there is no restriction on after-market acquisitions.

• ***Prepayment.*** Any C block licensee may use an amount equal to 70% of its total down payments for the licenses that it wishes to surrender as a credit toward the prepayment of any of its licenses, at face value of the Note. Subject to the amounts available for license prepayment, a licensee must pay off the outstanding principal debt obligations for all BTA licenses it holds within any single MTA, up to the amount of funds it has available. A licensee may also use additional monies (hereinafter referred to as "new money"), to prepay as many of its Notes as it desires. Installment payments made will be available to the licensee as a credit towards prepaying any of its Notes. Interest accrued from the date of the conditional license grant through the Election Date will be forgiven. Licenses that are not prepaid in accordance with this option must be surrendered to the Commission for reauction, in exchange for the Commission's forgiveness of the corresponding debt and permitting prepayment on other licenses under these terms. The remaining 30% of the down payments plus any unapplied portions of the first 70% of the down payments will not be

returned or available to licensees. The licensee may not rebid in the reauction for any of the licenses that the licensee relinquishes, and for a period of two years from the start date of the reauction may not otherwise acquire any such licenses in the secondary market.

7. These options will lead to a reauction of C block spectrum that will be open to all entrepreneurs, all applicants to the original C block auction,[6] and, with the exceptions we outline under the disaggregation and prepayment options, all current C block licensees. In the *Further Notice of Proposed Rule Making*, the Commission seeks comment on proposed rules and procedures for the reauction of any available C block licenses, including auction design, activity requirements, minimum opening bids for each license, application and payment procedures, procedures for filing petitions to deny, and proposals regarding the use of bidding credits.

III. BACKGROUND

8. Incentives to ensure participation by small businesses and other "designated entities" were required by Congress when enacting our authority to conduct auctions, as set forth in Section 309(j) of the Communications Act.[7] In accordance with its statutory mandate, in the *Competitive Bidding Fifth Report and Order*, the Commission established a variety of incentives to encourage small businesses to participate in the auction of C block 30 MHz and F block 10 MHz broadband

---

[6] ***But see***, paragraph 84, *infra* (where we seek comment on restricting participation in the reauction by any entity that has defaulted on any FCC auction payment).

[7] 47 U.S.C. §§ 309(j)(4)(A), (D).

PCS licenses.[8] Provisions to promote participation by small businesses in broadband PCS included limiting eligibility in the initial C and F block auctions to entrepreneurs and small businesses, offering varying bidding credits, and offering installment payment plans. The installment payment plan for C block permitted licensees that qualified as small businesses to pay 90% of the bid price over a period of ten years, with interest only paid for the first six years and interest and principal for the remaining four.[9] Installment payments for small business F block licensees were limited to 80% of the bid price over ten years, and payments consist of interest only for the first two years, then interest and principal for the remaining eight years.[10]

---

[8] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532 (1994) (*"Competitive Bidding Fifth Report and Order"*). Rules were amended in: Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Order on Reconsideration*, 9 FCC Rcd 4493 (1994); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994) (*"Competitive Bidding Fifth Memorandum Opinion and Order"*); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Sixth Report and Order*, 10 FCC Rcd 136 (1995). *See also* Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS, Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824 (1996); Amendment of the Commission's Cellular/PCS Cross Ownership Rule, GN Docket No. 90-314, *Report and Order*, 11 FCC Rcd 7824 (1996).

[9] 47 C.F.R. § 24.711(b)(3). In addition, there were other installment payment options available for bidders qualifying as entrepreneurs. *See* 47 C.F.R. §§ 24.711(b)(1)-(3). All bidders in the C block auction, however, qualified as small businesses.

[10] 47 C.F.R. § 24.716(b)(3). Entrepreneurs were also eligible for less favorable installment payment terms. *See* 47 C.F.R. §§ 24.711(b)(1)-(2).

9. On May 6, 1996 and July 16, 1996, the Commission concluded its broadband PCS C block auctions. Ninety bidders (including the C block reauction[11] winners) won 493 C block licenses. The broadband PCS D, E, and F block auction concluded on January 14, 1997, and 88 bidders won 491 F block licenses.[12] Net high bids[13] received for C block 30 MHz licenses, including C block reauction bids, totalled approximately $10.2 billion; net high bids received for F block 10 MHz licenses totalled $642.3 million.[14]

10. While many C block licenses were purchased for prices below or comparable to those for the A or B blocks, a handful of large bidders bid extremely high prices per pop for major markets, even adjusted for the value of the government financing we provide. The aggregate results of the C block auction, when measured in average price per pop paid, are markedly higher than the other PCS bands, even after adjusting for financing, and even though many individual small licensees bid prices comparable to those paid for the A and B block PCS licenses.[15]

11. Earlier this year, the Commission received several

---

[11] *See* "18 Defaulted Licenses to be Reauctioned; Reauction to Begin July 3," *Public Notice*, DA 96-872 (rel. May 30, 1996).

[12] Bids were not submitted for two F block licenses, the Kokomo-Logansport, IN, BTA (B233) and the Kennewick-Pasco, MT, BTA (B228).

[13] "Net high bid" means the total amount bid less any bidding credit.

[14] Total bids received for all three 10 MHz licenses in the D, E and F block auction were $2.5 billion.

[15] *See* June 23, 1997, BT Wolfensohn Report in *"NextWave TeleCom Inc., Overview of Telecommunications Financing Considerations"*, attached to NextWave ex parte letter, June 23, 1997, and May 6, 1997, *Merrill Lynch High Yield Telecommunications Industry Update*.

requests, from both C and F block licensees, for relief associated with the installment payment program.[16] Some licensees sought relatively modest relief (*e.g.*, changing from quarterly to annual payments).[17] Other licensees sought more dramatic restructuring.[18] These requests described a range of apparent difficulties in accessing the capital markets, which many licensees argue were exacerbated by the relatively high prices per MHz per population ("per pop") paid for some of the C block licenses.

12. When formulating its original auction rules in 1994, the Commission considered the possibility of debt restructuring and observed that "if we allow a grace period or restructuring of the payment plan, we would follow our procedures ... under the Commission's existing debt collection rules and procedures."[19] We also said that in deciding whether to grant

---

[16] *See* "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," *Public Notice*, DA 97-82 (rel. June 2, 1997) (*"Installment Public Notice"*). *See also* Letter from Thomas Gutierrez, Esq., *et al* to Michele C. Farquhar, Esq., Chief, Wireless Telecommunications Bureau (March 13, 1997).

[17] *See, e.g.*, NextWave Comments at 4.

[18] *See, e.g.*, Fortunet Reply Comments at 9.

[19] Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2346, 2389 (1994) (*"Competitive Bidding Second Report and Order"*). The Commission's current rules provide that any licensee whose installment payment is more than 90 days past due shall be in default, unless a "grace period" request is filed. See 47 C.F.R. § 1.2110(e)(4). In anticipation of default on one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. To obtain such relief, licensees may file financial information (*e.g.*, income statements or balance sheets) to demonstrate financial distress. Interest that accrues during the pendency of a grace period is amortized over the remaining term of the license. 47

grace period requests "or to pursue other measures," we would consider a variety of factors, including payment history, how far into the license term the default occurs, and the level of built-out.[20] We noted that if a grace period was granted, a licensee could use that time to "maintain its construction efforts and/or operations while seeking funds to continue payments or seek from the Commission a restructured payment plan."[21] When we later revisited the issue of licensee default, we stated that we would approve debt restructuring whereby a licensee and its lenders agree that in the event of licensee default on its installment payments, the lenders will cure the default by assuming the payments (barring assumption of license control).[22] Aside from these statements, the Commission has not discussed debt restructuring.[23]

C.F.R. § 1.2110(e)(4)(ii). Finally, these rules provide that following the expiration of any grace period without successful resumption of payment, or upon denial of a grace period request, or upon default with no such request submitted, the license of an entity paying on an installment basis is cancelled automatically and the Commission will initiate debt collection procedures. 47 C.F.R. § 1.2110(e)(4)(iii).

[20] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. 47 C.F.R. § 1.2110(e)(4).

[21] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391.

[22] *See Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 471.

[23] But *see* "Wireless Telecommunications Bureau Staff Responds to Questions About Broadband PCS C Block Auction," *Public Notice* (rel. June 8, 1995) (addressing grace periods and other default questions).

13. *The Notice of Proposed Rule Making* to revise our Part 1 auction rules sought comment on several topics related to auction installment debt.[24] For example, we asked whether we should offer higher bidder credits in lieu of installment payments, or whether we should require, in an effort to reduce the likelihood of defaults, supplementation of the upfront payment during an auction when the cumulative high bids exceed some multiple of the upfront payment.[25] We sought comment on (1) imposing late payment fees on installment payments; (2) the default provisions of Section 1.2104(g) in the event of installment payment defaults; and (3) revised procedures for granting grace period requests.[26] Many commenters opposed any new fees for late submission of installment payments, and many favored simplified grace period procedures.[27]

14. On March 31, 1997, in response to a joint request from several C block licensees seeking to modify their installment payment obligations, and because of other debt collection issues, the Bureau suspended the deadline for payment of

---

[24] Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, WT Docket No. 97-82, FCC 97-60 (rel. Feb. 28, 1997) (*"Part 1 Proceeding"*).

[25] *Part 1 Proceeding* at pp 34, 35.

[26] *Id.* at pp 70, 74, 77.

[27] *See* Comments filed in the *Part 1 Proceeding*, including: Interactive Video Data Trade Association ("ISTA") Comments at 1 and Reply Comments at 4-5; Pocket Comments at 7-8; Merlin Reply Comments at 4. Part 1 grace period comments: AMTA Comments at 12-13; Cook Inlet Region, Inc. ("CIRI") Comments at 16; Pocket Comments at 7-8; AirTouch Comments at 8; Merlin Reply Comments at 4; Airadigm Reply Comments at 2; ISTA Reply Comments at 5-6.

installment payments for all C block licensees.[28] On April 28, 1997, the Bureau extended the suspension to F block licensees.[29]

15. On June 2, 1997, the Bureau, explaining that it had received several proposals from C block licensees regarding alternative financing arrangements and a petition for rule making regarding the issue of broadband PCS C block installment payments, issued the *Installment Public Notice* seeking comment on these proposals and invited any "additional proposals for addressing the C and F block broadband PCS financing terms."[30] The Bureau also sought comment on whether C block licensees should be permitted to prepay their installment debt. In response to the *Installment Public Notice*, the Commission received over 160 filings.[31] The majority of commenters favor some type of relief, including debt restructuring, spectrum disaggregation, or a penalty-free license surrender ("amnesty"), followed by a reauction.[32] Other commenters express disapproval of any

---

[28] *See* Installment Payments for PCS Licenses, *Order*, DA 97-649 (rel. March 31, 1997).

[29] *See* "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block Licenses," *Public Notice*, DA 97-883 (rel. April 28, 1997) at 2.

[30] *Installment Public Notice*.

[31] Appendix A contains a list of parties filing comments, reply comments, and *ex parte* comments, and the abbreviated names of the commenters.

[32] *See, e.g.*, NextWave Comments at 16-19; Fortunet Comments at 4-6; GWI Comments at 7-12; Horizon Comments at 13-15; Chase *ex parte* letter, August 11, 1997 at 1-2.

relief, and urge the Commission to strictly enforce its rules.[33] These comments were incorporated into the record in this docket.[34]

16. On June 30, 1997, the Bureau conducted a public forum in Washington, D.C. ("FCC Public Forum") to discuss broadband PCS C and F block installment payment issues, including the alternative financing arrangements proposed in connection with the Public Notices issued on June 2, 1997. The FCC Public Forum consisted of two panels. The first discussed whether the Commission should consider modification of its installment payment program,[35] and the second discussed alternative financing arrangements and debt

---

[33] *See, e.g.*, Airadigm Comments at 2-3; ALLTEL Comments at 2; CIRI Comments at 2-3.

[34] We also note that several requests for an extension of the deadline for making payments have been filed with the Bureau pursuant to 47 C.F.R. § 1.2110(e)(4)(ii). In addition, two parties have filed requests for the restructuring of installment payment schedules, and several parties have filed requests for annual, as opposed to quarterly payment schedules. These requests will be addressed separately by the Bureau in accordance with our decision today. Several parties also have filed requests for waiver of the 7 percent interest rate applicable to eligible broadband PCS C block licensees whose licenses were conditionally granted on September 17, 1996, and who elected to utilize the Commission's installment payment plan. See Comment Requested on 7 Percent Interest Rate Imposed on C Block Installment Payment Plan Notes, *Public Notice*, DA 97-1152 (rel. June 2, 1997). These requests also will be addressed separately by the Bureau in accordance with our decision today.

[35] *See* Cook Inlet Region, Inc., Petition for Rulemaking (filed May 7, 1997). Panelists were Michael Roberts, President, National Association of PCS Entrepreneurs; Roger Linquist, CEO, General Wireless Inc.; Stephen Hillard, CEO, Cook Inlet Communications Inc.; Karen Johnson, President, Fortunet Communications, L.P.; and Shelley Spencer, General Counsel, AirGate Wireless.

restructuring.[36] FCC staff members and the public audience also participated throughout the discussions.[37] An FCC Task Force also was established which included representatives from the Bureau, the Office of Plans and Policy, the Office of General Counsel, and the Office of Communications Business Opportunities. This Task Force was charged with evaluating proposals for alternative financing arrangements submitted by PCS C and F block licensees and recommending to the Commission how to respond to those proposals.

17. Both before and after the FCC Public Forum, numerous comments, reply comments, and *ex parte* letters and presentations were submitted to the Commission as part of this proceeding. Some commenters argue both for and against various proposals for licensee relief, while others argue that the Commission should enforce its rules as they currently exist to preserve the integrity of the auction program. The Commission thus has before it a wide range of proposals from entrepreneur block licensees, financial institutions and investors, equipment vendors, and other interested parties. We also have received a number of letters from individual Senators and Congressmen suggesting various approaches to resolving these issues and

---

[36] *See* Gutierrez Letter, Sawicki Letter, Barker Letter, and GWO informal proposal (attached to *Installment Public Notice*). Panelists were Norman Frost, Managing Director, Communications Group, Bear Stearns & Co.; John Bensche, Vice President/Senior Wireless Service Analyst, Lehman Brothers; Brian O'Reilly, managing Director-Communications Finance, Toronto Dominion Bank; Gregg E. Johnson, President, BIA Capital Corporation; and Mark Lowenstein, VP- Wireless/Mobile Communications, The Yankee Group.

[37] A videotape of the FCC Public Forum was placed in the record in this docket.

urging this Commission to act swiftly.[38] After consideration of the extensive record in this proceeding, we conclude that the options presented in this *Second Report and Order* offer the most appropriate and fair method of resolving C and F block financial concerns.

18. Although some commenters in this proceeding recommend deferral of the C block debt, the Commission declines to further explore these proposals.[39] We do not wish to

---

[38] *See* The Honorable Christopher S. Bond, ex parte letter, July 14, 1997; The Honorable Pete V. Domenici, *ex parte* letter, September 10, 1997; The Honorable James M. Inhofe, Don Nickles, and Conrad Burns, *ex parte* letter, August 7, 1997; The Honorable John McCain, *ex parte* letter, August 19, 1997; The Honorable John McCain, *ex parte* letter, September 18, 1997; The Honorable Daniel Patrick Moynihan, *ex parte* letter, August 4, 1997; The Honorable Rick Boucher, *ex parte* letter, July 25, 1997; The Honorable Richard Burr, *ex parte* letter, August 11, 1997; The Honorable Thomas Davis, *ex parte* letter, July 30, 1997; The Honorable John D. Dingell, *ex parte* letter, September 16, 1997; The Honorable Steny H. Hoyer, *ex parte* letter, August 7, 1997; The Honorable Sue W. Kelly, *ex parte* letter, August 11, 1997; The Honorable W.J. "Billy" Tauzin, *ex parte* letter, August 13, 1997; The Honorable W. J. "Billy" Tauzin and Edward J. Markey, *ex parte* letter, September 16, 1997.

[39] Suggestions in the record addressing "deferral/restructuring" propose that the Commission provide for some period (ranging from 2-20 years) during which installment payments would be deferred. Some of these plans explicitly reduce the "net present value" of the debt (*i.e.*, the discounted value of future cash flows less initial investment), while others leave it unchanged, assuming the government interest rate as the discount rate. *See, e.g.*, BMU Comments at 2; ClearComm Comments at 3 and Reply Comments at 3; Chase Comments at 3; Alpine Comments at 9 and Reply Comments at 11; Horizon Comments at 13; SBC Comments at 9; R&S Comments at 21; Indus Comments at 3; MFRI Comments at 3; Magnacom Comments at 1-2; NABOB Comments at 3-4; RFW Comments at 2; KPCS Comments at 2; Urban Comm Comments at 9 and Reply Comments at 4; PCS Plus Comments at 2; Holland Comments at 3; Eldorado Comments at 2; MCI Comments at 2; Bear Stearns Comments at 3; Fortunet Comments

adopt temporary solutions such as those that might only postpone these difficulties and further prolong uncertainty. Although these approaches would not necessarily result in a reduction of the current nominal debt owed to the Commission, there is no certainty the long term financial outlook facing many licensees would be improved. Finally, we believe that any further deferral of payments would be unfair to unsuccessful bidders who may have withdrawn from the C block when prices became too high, but might have remained had deferral opportunities been known.

19. Similarly, we do not wish to adopt proposals that result in a dramatic forgiveness of the debt owed. Although such an approach would not defer the problem, we believe that is would be very unfair to other bidders, and would gravely undermine the credibility and integrity of our rules. In fact, in his remarks at the Senate Hearing on High-Definition Television, Senator Hollings stated, ". . . [r]ules are rules . . . . If they cannot comply with their particular auction bid, out they go, and we will start over again. But this is not welfare. This is business."[40] Other Senators also urged the Commission to maintain the integrity of its rules for benefit of its overall auction program.[41] Other commenters assert that lowering the effective price after the auction unfairly advantages those who

---

at 4 and Reply Comments at 8; RTFC Reply Comments at 2; NextWave Reply Comments at 20; TRA Reply Comments at 5; The Honorable Thomas Davis *ex parte* letter, July 30, 1997; The Honorable Rick Boucher *ex parte* letter of July 25, 1997.

[40] Transition to Digital Television Hearing Before the U.S. Senate Committee on Commerce, Science and Transportation, 105th Cong., 1st Session (September 17, 1997) (Statement of Senator Hollings).

[41] *See* The Honorable John McCain, *ex parte* letter, September 18, 1997; The Honorable Paul D. Coverdell *ex parte* letter, September 24, 1997.

bid too high compared with those who withdrew.[42] In effect, the result could be interpreted as the Commission picking winners and losers on an unsupportable basis, instead of the marketplace determining winners based upon an auction. This concern was also expressed by Senator McCain.[43] Such a result would be contrary to our long-held goal to put licenses into the hands of those who value them the most.

20. In addition, we decline to make the disaggregation, amnesty, or prepayment options available to F block licensees. We believe that the nature and extent of any financing difficulties faced by the C block licensees appear to be different from any such problems facing entrepreneurs in the F block. We note that even after considering the difference in the spectrum block size and providing a discount for the government financing, C block prices were higher than F block prices on average. We therefore conclude that the options we adopt today will not apply to F block licensees.

IV. SECOND REPORT AND ORDER

21. As discussed above, we require that C and F block licensees resume their Note payments on March 31, 1998. They will also be required to pay on that date one-eighth of the Suspension Interest, and thereafter, pay one-eighth of the

---

[42] *See, e.g.*, AirGate *ex parte* letter, July 22, 1997, attachment at 3; Conestoga Comments at 2-3; Point Comments at 2-3.

[43] *See* The Honorable John McCain, *ex parte* letter, August 19, 1997. In his letter Senator McCain states, "[t]he law does not, and indeed could not, require the Commission to substantially revise the rules that govern these entities solely for the purpose of guaranteeing their ability to retain licenses. . . . To do so would be to unjustly enrich defaulting bidders...[and] unjustly penalize the rest of the bidders in all the PCS auctions who bid reasonably and in reliance on the existing rules."

Suspension Interest with each regular installment payment made until the Suspension Interest is paid in full. As used herein, "Suspension Interest" means the entire amount of the unpaid simple interest that was accrued at the rate set forth in each licensee's Note(s) during the period beginning with the date on which each license was conditionally granted through and including March 31, 1998 ("Suspension Period"). After March 31, 1998, payment due dates will conform to those indicated in the Notes executed by the licensees. We believe that there are C block licensees who will elect to continue making payments under their original C block Notes, as described above, which they will be entitled to do. In addition, we adopt three options relating to the rules governing installment payments for the C block. These are designed to help to resolve the financing issues facing C block licensees and restore certainty to the marketplace, while at the same time helping the Commission meet its statutorily mandated public interest considerations set forth under Section 309(j) of the Communications Act.[44]

22. These goals will also be furthered by generally applying the same rules regarding eligibility that were used in the C block auction to the reauction of C block licenses.[45] Thus, all applicants meeting the current definition of "entrepreneur" will be eligible to bid in the reauction. We also will allow all entities that were eligible for and participated in the original C block auction to bid in the reauction. Further, with the exception of incumbent licensees who choose to disaggregate portions of spectrum they currently hold (*see*

---

[44] *See* 47 U.S.C. § 309(j)(3)(A)-(E). Any party holding a C block license as of the January 15, 1998 election deadline will be permitted to elect any of the options we adopt.

[45] *See* 47 C.F.R. § 24.709.

Section IV.B., *infra*), and those licensees who surrender licenses under the prepayment option (*see* Section IV.D., *infra*), all C block licensees who return licenses to the Commission will be eligible to bid on all markets in the reauction.

A. Resumption of Payments

23. *Background*. On March 31, 1997, the Bureau suspended the deadline for payment of all broadband PCS C block installment payments until further notice.[46] By Public Notice issued on April 28, 1997, the Bureau extended the suspension to F block licensees.[47] (The March 31, 1997 Order and April 28, 1997 Public Notice will be referred to collectively as the "*Suspension Order*"). In the *Suspension Order*, we indicated that the suspension would remain in effect until further action to reinstate payment deadlines, and that interest would continue to accrue until such action was taken.

24. *Discussion*. The majority of commenters in this proceeding, including many members of Congress, agree that the Commission must act quickly to make a decision on what course of action to take.[48] Those favoring restructuring suggest

---

[46]*See* n.28, *supra*. *See also* Letter from Daniel B. Phythyon, Acting Chief, Wireless Telecommunications Bureau to Mark J. Tauber, Piper & Marbury (April 30, 1997) ("Tauber Letter").

[47]*See* n.29, *supra*.

[48]*See, e.g.*, ClearComm Comments at 3; Chase Comments at 2; Alpine Comments at 11 and Reply Comments at iii, 9; AmeriCall Comments at 10; MCI Comments at 2 and Reply Comments at 7-8; Cellexis Reply Comments at 2-3; OnQue Reply Comments at 10; NextWave Reply Comments at 5-6; The Honorable W. J. "Billy" Tauzin and the Honorable Edward J. Markey *ex parte* letter, September 16, 1997; The Honorable John Dingell, *ex parte* letter, September 16, 1997; The Honorable John McCain *ex parte* letters of August 19, 1997 and September 18, 1997.

that any further delay will make any relief ineffective because further delay to market puts C block licensees at a competitive disadvantage and makes attracting investment capital to support their build-out even more difficult.[49] In addition, many commenters opposed to restructuring also support a timely decision, believing that a cloud of uncertainty hangs over the wireless sector until the Commission decides what action to take.[50] We therefore believe that it is necessary to remove any uncertainties surrounding the installment payment program by announcing a date certain for the resumption of installment payments.

25. Accordingly, effective March 31, 1998, we rescind the *Suspension Order* and reinstate the installment payment plans for all C and F block licensees. We also direct that all payments due and owing on and after March 31, 1998 be made in accordance with the terms of each licensee's Note, associated Security Agreement, and the Commission Orders and regulations. All Suspension Interest will become due and payable over a two-year period as discussed in paragraph 27, *infra*. With the exception of the modifications provided in this *Second Report and Order*, all Commission rules regarding installment payments and defaults for the broadband PCS C and F blocks will remain in effect. Any licensee that fails to remit the payment due on March 31, 1998, and remains delinquent for more than 60 days (*i.e.*, fails to make the March 31, 1998, payment on or before May 30, 1998), will be in

---

[49]*See, e.g.*, MCI Reply Comments at 7-8 (quoting "Bensche Marks" July 1, 1997, summary of panel discussions at the FCC Public Forum of June 30, 1997).

[50]*See, e.g.*, U.S. Airwaves Reply Comments at 3; Nokia *ex parte* letter, September 15, 1997 at 1; AmeriCall, ClearComm, and Chase, *ex parte* letter, September 17, 1997 at 1.

default on its license.[51] Given the one year suspension, we believe that providing a shorter automatic grace period is justified. *See* paragraph 30, *infra*.

26. We conclude that any licensee that continues under its original Note(s), will be required to pay on March 31, 1998, one-eighth of the Suspension Interest in accordance with the provision of paragraph 27, *infra*. Thereafter, regular payments will become due and payable in accordance with the provisions of the licensee's original Note.[52]

27. We conclude that it could place a significant burden on licensees to require payment of the entire amount of the Suspension Interest on March 31, 1998. We therefore require that broadband PCS C and F block licensees submit one-eighth of the Suspension Interest on March 31, 1998, and one-eighth of the Suspension Interest with each regular installment payment made thereafter until the Suspension Interest is paid in full. After March 31, 1998, payment due dates will conform to those indicated in the Note(s) executed by the licensees. While the first regular installment payment next made after March 31, 1998, will be pro-rated to account for the resumption of payments on March 31, 1998, all regular installment payments thereafter will be in the amounts shown on the amortization schedule attached to and made a part of each Note, as amended, plus the applicable payments of Suspension Interest. For example, for those licensees granted in September, 1996 whose regular installments occur on March 31, June 30, September 30, and December 31 of each year, the next regular payment due after March 31, 1998, will be due on

---

[51] *See* 47 C.F.R. § 1.2110(e)(4)(i). The 60-day period is an exception to our existing rules that provide for an automatic 90-day non-default period.

[52] *See* the provisions of paragraph 27, *infra*.

June 30, 1998, and will include the amount of interest accrued from April 1, 1998, through and including June 30, 1998, plus one-eighth of the Suspension Interest. The next regular payment will be due on September 30, 1998, and will be due in the amount shown on the amortization schedule attached to the Note (*i.e.*, interest from July 1, 1998, through and including September 30, 1998), plus one-eighth of the Suspension Interest. Regular payments will continue on each and every December 31, March 31, June 30, and September 30 thereafter until the Note is paid in full. For these licensees, the payment due on December 31, 1999, will be the last payment due that includes any amortized Suspension Interest.[53] All payments after that date will continue in accordance with the terms of the amortization schedule attached to the Note executed by the licensee. All installment payments previously made by licensees who elect one of the three options will be applied in accordance with the provisions set forth under the discussion of

---

[53] For those licenses granted in November, 1996 whose regular installments occur on the last day of May, August, November, and February of each year, the next regular payment due after March 31, 1998, will be due on May 31, 1998, and will include the amount of interest accrued from April 1, 1998 through and including May 31, 1998, plus one-eighth of the Suspension Interest. The next regular payment will be due on August 31, 1998, and will be due in the amount shown on the amortization schedule attached to the Note (i.e., interest from June 1, 1998, through and including August 31, 1998), plus one-eighth of the Suspension Interest. Regular payments will continue on the last day of the month of November, February, May and August thereafter until the Note is paid in full. For these licensees, the payment due in February, 2000 will be the last payment due that includes any amortized Suspension Interest. Any payments after this date would continue in accordance with the terms of the amortization schedule attached to the Note executed by the licensee.

each option, *see* Section IV., *infra*.[54]

28. We delegate to the Bureau authority to set forth all procedures for implementing the resumption of payments.

29. Broadband PCS C block licensees choosing to surrender their licenses pursuant to the amnesty option described in Section IV.C., *infra* and those surrendering licenses that are not prepaid pursuant to the prepayment option described in Section IV.D., *infra*, will be required to return to the Commission each original Note and Security Agreement for cancellation by the Commission.

30. We will not entertain any requests for an extension of the March 31, 1998 deadline beyond the automatic 60-day non-default period set forth in paragraph 25, *supra*. The *Suspension Order* already has afforded a significant period to licensees during which payments were not required. Therefore, we intend to deny any requests for a grace period beyond the automatic 60-day non- default period we adopt herein, including any requests made pursuant to Section 1.2110 of the Commission's rules.[55]

31. C block licensees may resume payments under their current Note or elect one of the three options described below.

---

[54] For example, for a licensee electing to continue making payments under its existing Note, if a licensee had accrued $100,000 in Suspension Interest during this period and had previously made installment payments totaling $20,000, then the amount of Suspension Interest would be $80,000 (no additional interest will be assessed against this amount) and would be payable in eight equal payments of $10,000.

[55] 47 C.F.R. § 1.2110(e)(4)(ii).

B. Disaggregation of Spectrum for Reauction

32. *Background.* Existing Commission rules permit broadband PCS licensees to disaggregate their spectrum.[56] Under these rules, a broadband PCS licensee in the A, B, D, or E block may file an application with the Commission requesting permission to disaggregate any portion of its spectrum to other eligible entities at any time following the issuance of its license.[57] The existing rules also permit a C or F entrepreneur block licensee to disaggregate spectrum to other C and F block eligible entities for the first five years following the issuance of a license.[58] After the first five years of holding a license, an entrepreneur block licensee also may disaggregate to any qualified non-entrepreneur, provided that the non-entrepreneur compensates the federal government through an unjust enrichment payment proportionate to the amount of spectrum disaggregated.[59] If the entrepreneur block licensee has elected to pay using installment payments, the qualified entity receiving the disaggregated spectrum will also be permitted to make installment payments equaling its *pro rata* portion of the remaining government obligation.[60] The rules require that new notes and security agreements be executed by

---

[56] Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, *Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 21831 (1996) (partitioning and disaggregation rules now codified at 47 C.F.R. 24.714) (hereinafter "*Disaggregation Order*").

[57] See 47 C.F.R. § 24.714(a)(1) (parties "shall request an authorization for partial assignment of a license pursuant to Section 24.839").

[58] 47 C.F.R. § 24.714(a)(3).

[59] 47 C.F.R. § 24.714(c)(1).

[60] 47 C.F.R. § 24.714(d)(1).

both the former and the new licensee.[61]

33. A number of C block licensees, as well as several financial advisors and equipment manufacturers, have requested that the Commission permit licensees to disaggregate spectrum and surrender it to the Commission for reauction in exchange for a *pro rata* reduction in debt.[62] Generally, these proposals differ in: (1) the amount of spectrum that could be surrendered to the Commission; (2) the amount and form of credit for the spectrum surrendered; and (3) the terms and eligibility requirements for reauction of the disaggregated spectrum.

34. AmeriCall proposes "amnesty by thirds," which would permit each licensee to disaggregate its C block license into three 10 MHz portions, any one of which the licensee could surrender to the Commission for forgiveness of its related installment debt.[63] Under this proposal, surrendered spectrum would be reauctioned and the Commission would retain the down payments made by the initial licensee.[64] AmeriCall suggests allowing a licensee to participate in reauctions of C block spectrum, but only reauctions for spectrum other than that surrendered by the licensee.[65] AmeriCall also suggests that

---

[61] 47 C.F.R. § 24.714(d)(3)(ii).

[62] *See, e.g.*, AmeriCall *ex parte* letter, August 5, 1997 at 1; GWI *ex parte* letter, August 15, 1997 at 1; Magnacom *ex parte* letter, August 13, 1997 at 1; BIA Capital *ex parte* letter, August 4, 1997 at 1-2; Nokia *ex parte* letter, September 16, 1997 at 1; Horizon Comments at 5-6 (all seeking a liberalization of the Commission's current rules for disaggregation to private parties).

[63] AmeriCall *ex parte* letter, August 5, 1997 at 2.

[64] *Id.*

[65] *Id.*

a licensee be required to wait two years before being allowed to reacquire spectrum that it has surrendered to the Commission.[66] AmeriCall proposes that C block licensees continue operating under the terms and conditions of the initial payment obligation, but that the Note be reduced in proportion to the amount of spectrum surrendered and the associated Security Agreements and Uniform Commercial Code ("UCC") filings modified accordingly.[67]

35. A number of other commenters propose that the Commission adopt variations of AmeriCall's disaggregation proposal. BIA Capital's disaggregation proposal generally tracks AmeriCall's proposal, but would allow licensees to surrender 10, 20 or 30 MHz of spectrum.[68] Magnacom proposes that parties be allowed to disaggregate up to 15 MHz of spectrum and that all payments be applied to the portion of the license retained.[69] Urban Comm advocates that parties be allowed to disaggregate up to 10 MHz of spectrum.[70] In a recent joint filing, AmeriCall, Clearcomm, and Chase support a disaggregation option that would allow a licensee to disaggregate 15 MHz from one or more of the C block licenses it now holds, on a license-by-license basis, and to have its indebtedness reduced proportionately (*i.e.*, by 50%). The disaggregated spectrum would be reauctioned expeditiously and the disaggregating licensee would be precluded from

---

[66] *Id.*

[67] *Id.*

[68] BIA Capital *ex parte* letter, August 4, 1997 at 1-2.

[69] Magnacom,*ex parte* letter, August 13, 1997 at 1; *see also* Northern Michigan PCS Consortium, L.L.C.*ex parte* letter, August 14, 1997 (supporting the application of all payments to the debt owed to the FCC).

[70] Urban Comm *ex parte* letter, September 17, 1997 at 4-5.

rebidding on spectrum it has disaggregated.[71]

36. Parties advocating a disaggregation option cite a number of benefits. AmeriCall contends its "amnesty by thirds" proposal would help the Commission avoid both wide scale bankruptcies as well as the need for a "bail-out" in the form of radical debt restructuring.[72] It contends that by requiring licensees to forfeit all down payments for the surrendered spectrum, disaggregation imposes a *penalty* on C and F block licensees who choose this option.[73] AmeriCall argues further that spectrum disaggregation benefits participating licensees by allowing them to reduce their debt, which would in turn increase their access to capital markets.[74] AmeriCall contends that because it avoids the "more substantial financial fixes" advocated by other debtors, disaggregation is a fairer proposal, and one less prone to subsequent litigation.[75] Finally, AmeriCall contends that the "amnesty by thirds" proposal is pro-competitive in that it will introduce numerous new competitors, including licensees from other spectrum blocks.[76] GWI indicates that spectrum disaggregation "works well" for C block licensees in small markets where a full 30 MHz of spectrum is not required.[77] Urban Comm cites several public interest benefits deriving from spectrum disaggregation. According to Urban Comm,

---

[71] AmeriCall, ClearComm, and Chase *ex parte* letter, September 17, 1997.

[72] AmeriCall *ex parte* letter, August 5, 1997 at 3-4.

[73] *Id.* at 3.

[74] *Id.* at 4. *See also* GWI *ex parte* letter, August 15, 1997 at 1.

[75] AmeriCall *ex parte* letter, August 5, 1997 at 4.

[76] *Id.* at 5.

[77] GWI *ex parte* letter, August 15, 1997 at 1.

disaggregation provides spectrum to qualified designated entities without delay, decreases time to market for existing licensees, and injects new competition into the marketplace.

37. In opposition to the disaggregation option, CONXUS, a narrowband PCS licensee, argues that the option does not confer on narrowband licensees benefits comparable to those accorded to broadband licensees since there is insufficient bandwidth in narrowband to allow disaggregation to occur without interfering with nationwide programs.[78] Omnipoint argues that any type of "amnesty solution," including spectrum disaggregation, would require the Commission to adopt rules protecting companies that have substantially built- out their networks.[79]

38. *Discussion*. In view of the substantial support and public interest benefits accruing from an alternative that would permit a voluntary surrender of spectrum to the Commission while maintaining the fairness and integrity of the auction, we adopt a disaggregation option. Under the disaggregation option we adopt today, any C block licensee may disaggregate a portion of its spectrum from each of its licenses and surrender it to the Commission for reauction.[80] The licensee must disaggregate 15 MHz of spectrum it holds across all BTAs in an MTA. These provisions prevent licensees from selectively surrendering spectrum for which they may believe they paid too much, or otherwise discarding spectrum in markets that may be more difficult to serve (commonly referred to as "cherry-

---

[78] CONXUS *ex parte* letter, August 27, 1997 at 1-2.

[79] Omnipoint *ex parte* letter, September 5, 1997 at 2.

[80] *See* Section V., *infra* (*Further Notice of Proposed Rule Making* requesting comment on rules and procedures for reauction).

picking" of licenses or spectrum).[81] We limit the ability of licensees to selectively disaggregate spectrum within an MTA also to facilitate attempts by new bidders to aggregate spectrum and initiate service. Because we are allowing disaggregation on an MTA-by-MTA basis, special exemptions for built-out systems -- such as the one we adopt under the amnesty option discussed below in paragraphs 53-58 -- are unnecessary. In cases where a licensee has built-out a BTA, it can choose either to retain all 30 MHz in each of the BTAs it has licenses for in an MTA, or it can operate its built-out system with 15 MHz. We believe that this flexibility, compared to the "all-or-nothing" approach, mitigates the need for a build-out exception for this option.

39. Licensees electing this option will be required to return half of their spectrum at 1895 - 1902.5 MHz paired with 1975 - 1982.5 MHz, which is spectrum contiguous to the PCS F block. The surrender of spectrum adjacent to the F block will provide sufficient contiguous spectrum for both the incumbent and new licensees to offer competitive PCS services.

40. Under the disaggregation option, the Commission will reduce the amount of the debt owed by an amount equal to the *pro rata* portion of the spectrum returned to the Commission, *i.e.*, by 50%, subject to coordination with the Department of Justice pursuant to applicable federal claims collection standards.[82] The Commission will retain the *pro rata* portion of the down payments applicable to the spectrum. The following illustrates how this proposal would operate in

---

[81] For example, if a licensee holds four BTA licenses in MTA No. 4 (comprising Northern California and Northern Nevada), the licensee must choose to disaggregate 15 MHZ from each or none of the four BTA markets.

[82] *See* 4 C.F.R. Parts 101-105.

practice:

> *Company X holds a 30 MHz license in a BTA market; paid the Commission $100,000 in its down payment; and owes the Commission $900,000 on a net bid of $1,000,000. Company X could disaggregate 15 MHz and surrender it to the Commission for reauction, and the Commission would retain $50,000 of the down payment. In return, the Commission would reduce the licensee's obligation to the government to $450,000.*

The face amount of the licensee's Note will be adjusted to reflect the new principal, and the Note will then be amortized from the original date of execution to calculate the payments at the new face amount of the Note. All installment payments made as of March 31, 1997,[83] will be applied to reduce the amount of the Suspension Interest calculated on the new principal balance to be made in eight equal payments beginning March 31, 1998.

41. Where applicable, the existing disaggregation rules will govern this option.[84] However, the broadband disaggregation rules were not designed for the surrender of spectrum to the Commission.[85] Thus, existing rule provisions on designated entity transfer restrictions,[86] unjust enrichment,[87]

---

[83] This includes any payments due prior to and on March 31, 1997.

[84] *See* 47 C.F.R. § 24.714 (broadband PCS partitioning and disaggregation rules).

[85] *See Disaggregation Order*, 11 FCC Rcd 21831.

[86] 47 C.F.R. § 24.714(a)(3).

[87] 47 C.F.R. § 24.714 (c)(1), (2), (3).

installment payments, abbreviated license terms[88] and construction requirements,[89] restrictions on the amount of spectrum that can be disaggregated,[90] and similar rules will not apply to disaggregation to the Commission authorized by this option. In order to take advantage of the disaggregation option, licensees will be required to make an election consistent with the procedures specified in Section IV.E., *infra*.

42. In order to avoid unjust enrichment, licensees (defined as qualifying members of the licensee's control group, and their affiliates) will be prohibited from bidding in the subsequent reauction for spectrum the incumbent licensee has disaggregated. However, they will be permitted to acquire spectrum for any BTA for which the incumbent licensee has not disaggregated spectrum. We do not believe that it would be fair for these entities to benefit from a reauction after taking advantage of the disaggregation option. This prohibition against subsequent participation in the reauction for the spectrum disaggregated by the same party is supported by a number of commenters.[91] To ensure further against unjust enrichment, these entities will also be barred from reacquiring the spectrum they have surrendered to the Commission through a secondary market transaction for a period of two years from the start of a

[88] 47 C.F.R. § 24.714(e).

[89] 47 C.F.R.§§ 24.714(f). Thus, a licensee that disaggregates spectrum to the Commission must still fully fulfill its original construction requirements with regard to the 15 MHz that it retains.

[90] 47 C.F.R. § 24.714(b)(3) ("Spectrum may be disaggregated in any amount").

[91] *See* Horizon Comments at 14; AmeriCall *ex parte* letter, July 11, 1997; AirGate Wireless,*ex parte* letter, Sept. 9, 1997.

reauction.[92]

43. We believe that the disaggregation option set forth above is consistent with our goals in this proceeding and serves the public interest. First, this option preserves the credibility and integrity of the Commission's rules. The relief we provide is another means of making more efficient use of the spectrum. It does not provide a windfall or unfair advantage to the C block licensees availing themselves of the disaggregation option. The disaggregating licensee continues to pay for spectrum at its net high bid price,[93] and the Commission receives full payment for the spectrum retained by the licensee. In addition, the Commission will retain 50% of the down payment consistent with the amount of spectrum being surrendered to the Commission. Moreover, disaggregation with a *pro rata* adjustment in debt is consistent with the Commission's rules with regard to private party disaggregation.[94]

44. Second, the disaggregation option is fair and equitable to all interested parties. Losing bidders and other eligible parties will have an opportunity to bid on the disaggregated spectrum in the reauction. Also, by limiting disaggregation of spectrum to 15 MHz blocks on a BTA within an MTA basis, we increase the likelihood that the licenses available for reauction will be in quantities and geographic clusters that are commercially viable. In addition, by providing this limited opportunity to "pick and choose" which licenses to disaggregate, and not requiring the surrender of all 30 MHz of

[92] *See* AmeriCall *ex parte* letter, August 5, 1997 at 2.

[93] *See* n.13, *supra*.

[94] 47 C.F.R. § 24.714.

the spectrum it holds in an MTA, we make this option fair to those who have built- out some of their markets.[95] Although this option is not being made available to the narrowband or F block licensees, we do not believe that it is unfair to these parties or to other Commercial Mobile Radio Service ("CMRS") providers. This option does not materially alter the competitive landscape for CMRS services. Given the current state of the market and the Commission's existing rules, it is reasonable to expect that some C block spectrum will be transferred to competitors through reauction or private sale. Our actions here facilitate this process, by reducing the amount of spectrum that would otherwise be marketed in a piecemeal fashion. Moreover, as noted above, other parties will have an opportunity to bid on this spectrum in the reauction and, because of the spectrum's proximity to the F block, the spectrum may be particularly attractive to prospective licensees.

45. Third, the disaggregation option is consistent with our Section 309(j) obligation to promote opportunities for designated entities, including small businesses. According to a number of commenters, including those in the financial community, a reduced government debt burden and the resulting lower cost per MHz pop will enhance prospects for existing small business licensees to attract debt and equity capital.[96] This, in turn, should assist current C block licensees in moving forward with the deployment of their service offerings. Disaggregation will also provide opportunities for other small businesses to enter the PCS market in the future. Finally, by requiring C block licensees to disaggregate the 15

---

[95] *See, e.g.*, Omnipoint *ex parte* letters, August 18, 1997, September 3, 1997, and September 5, 1997 at 2.

[96] BIA Capital,*ex parte* letter, August 4, 1997 at 1.

MHz of spectrum adjacent to the F block, we provide opportunities for existing F block licensees to aggregate spectrum in a manner that could benefit their planned or prospective service offerings.

C. Surrender Licenses for Reauction (Amnesty)

46. *Background.* In response to our *Installment Public Notice* seeking comment on broadband PCS installment payment issues, a number of commenters express support for an option that would permit C block licensees to surrender their licenses to the Commission for reauction in exchange for forgiveness of the related debt and any interest and penalties[97] (generally referred to as "amnesty").[98] Commenters have submitted a variety of proposals for the terms of an amnesty option. Horizon states that an amnesty program should be designed to prevent a large scale surrender of licenses, and should encourage return of a license only in advance of a business failure. Horizon would permit a licensee to be selective in surrendering licenses, but would prohibit a licensee from rebidding on any license it surrendered and would prohibit a licensee's participation in the reauction entirely if it surrendered a total of more than five licenses. To facilitate this plan, Horizon asks that we waive our current cross default policies so that a licensee able to construct some, but not all, of its licenses will be able to return those licenses it cannot construct without placing all of its licenses in default. Horizon concludes that adopting such an amnesty plan would serve the

---

[97] *See* 47 C.F.R. §§ 24.708(b), 1.2109(c), 1.2104(g)(2).

[98] *See, e.g.*, R&S *ex parte* letter, August 11, 1997 at 1; MCI *ex parte* letter, August 14, 1997 at 2; Urban Comm *ex parte* letter, August 21, 1997; GWI *ex parte* letter, August 4, 1997; NextWave *ex parte* letter, July 29, 1997; El Dorado *ex parte* letter, August 13, 1997 at 2-3.

public interest by getting licenses in the hands of companies willing and able to provide service to the public.[99]

47. R&S[100] and Cyber Sites[101] propose that the Commission permit C block licensees to surrender their licenses and obtain a full refund of all payments without penalty. GWI suggests that the Commission allow licensees to exchange all licenses in return for a "store credit" equal to 100% of the original down payment, which could be applied to licenses won in a "cash upfront" reauction. GWI contends that there should be no restriction on the licensee's bidding in the reauction.[102] NextWave, too, supports an "amnesty day" for the surrender of licenses and a subsequent reauction, but stresses that licensees should be allowed to retain their most desirable licenses.[103] NextWave submits that the total amount of the original down payments should be credited toward reauction bids "with a reasonable penalty."[104]

48. Other commenters, including C block licensees AmeriCall[105] and Chase,[106] endorse a "simple amnesty" program pursuant to which a licensee would be obliged to surrender all of its C block licenses in return for forgiveness of

---

[99] Horizon Comments at 13-15.

[100] R&S Comments at 13-15.

[101] Cyber Sites Comments at 3.

[102] GWI *ex parte* letter, August 4, 1997.

[103] NextWave *ex parte* letter, August 5, 1997.

[104] NextWave *ex parte* letter, August 5, 1997.

[105] AmeriCall *ex parte* letter, July 11, 1997; AmeriCall, ClearComm, and Chase *ex parte* letter, September 17, 1997.

[106] Chase *ex parte* letter, August 11, 1997.

its debt and an opportunity to participate in any reauction of the returned licenses or other licenses. Equipment manufacturer Nokia also endorses an amnesty program that would permit a licensee to surrender all of its C block licenses in return for forgiveness of all associated debt and an opportunity to bid at the reauction.[107]

49. Fortunet states that a simple amnesty program does not provide sufficient relief, and asks that licensees receive a refund of their down payments and interest payments made on those licenses surrendered.[108] MCI also supports permitting licensees to surrender all of their C block licenses with no further financial obligation, but suggests that a licensee be permitted to receive only "a fraction" of the down payment already made.[109]

50. In addition to the many commenters who oppose any rule changes, including a grant of amnesty,[110] a number of commenters have resisted implementation of an amnesty plan and have identified various problems specific to the amnesty option. Cook Inlet recommends that the Commission strictly enforce its rules as they currently exist, and take aggressive measures to collect all debt,[111] noting that other alternatives, including an amnesty plan, invite litigation and threaten the

---

[107] Nokia *ex parte* letter, September 16, 1997.

[108] Fortunet Reply Comments at 5.

[109] MCI *ex parte* letter, August 14, 1997. *See also* Chase *ex parte* letter, August 11, 1997.

[110] *See, e.g.*, ClearComm *ex parte* letter, August 7, 1997, opposing "any substantially penalty-free amnesty" and advocating, inter alia, penalties such as denial of future designated entity status.

[111] Cook Inlet *ex parte* letter, August 5, 1997 at 1.

auction program's integrity.[112] However, Cook Inlet states that, if an amnesty program is adopted, certain limitations should be imposed, including prohibitions against participation in the reauction of their licenses by those who participate in amnesty (principals and control group members), against participation by any entity in bankruptcy, and against cherry picking among those licenses to be surrendered. In order to expedite reauction, Cook Inlet suggests that the Commission refund 25% of their down payments to licensees who surrender their licenses -- as "walk away" money.[113]

51. Omnipoint opposes amnesty because "operational" C block companies would be left with no recourse under any of the amnesty proposals, and would face a significant relative disadvantage in accessing capital markets. Omnipoint points out that this might deprive the public of the service that such licensees are providing.[114] Omnipoint states that it and other operational C block licensees have "operating businesses [that] are completely tied to specific C block licenses"[115] and do not have the same flexibility to cancel licenses voluntarily. Omnipoint asserts that these licensees' access to public capital markets will be hampered by policies that would, in effect, reduce per pop prices paid for similar properties *i.e.*, the surrendered C block licenses, and will strand those licensees

---

[112] Cook Inlet *ex parte* letter, August 15, 1997.

[113] Cook Inlet *ex parte* letter, August 5, 1997 at 2-3. Cook Inlet argues that the Commission would also have to provide compensatory compliance benefit and transition rules for control group parties who are meeting debt obligations and are not subject to bankruptcy (*e.g.*, an additional 10 percent bidding credit in any reauction and relaxed control group and transfer rules). *Id.*

[114] Omnipoint *ex parte* letter, September 5, 1997.

[115] *Id.* at 2.

that have been significantly built- out with licenses that have "artificially higher prices" per pop.[116]

52. Like Omnipoint, Alpine argues that entities like itself, which bid in good faith and intend to construct their markets, will not be helped by an amnesty program.[117] However, Alpine supports an amnesty plan structured to encourage overextended licensees to take prompt remedial action and free up the C block for reauction and subsequent development. Alpine explains that the ability to roam is essential to the viability of its system and to that of other operational C block systems, but cannot be offered to potential customers if significant portions of the C block have not been developed. Therefore, Alpine endorses an amnesty option that would encourage speedy surrender and reauction by permitting licensees to turn in one or more of their licenses and to receive credit for the down payments, to be applied against other obligations.[118]

53. *Discussion.* We conclude that it serves the public interest as articulated in our goals, Section II, *supra*, to adopt an amnesty option that permits any C block licensee to surrender all of its licenses in exchange for relief from its outstanding debt and waive any applicable default payments, subject to coordination with the Department of Justice pursuant to applicable federal claims collections standards.[119] We adopt the amnesty option for purposes of speeding use of the C block spectrum to provide services to the American public. The surrender of licenses under this option will provide qualified

---

[116] *Id.* at 3.

[117] Alpine Reply Comments at 9-11.

[118] Alpine *ex parte* letter, September 17, 1997 at 2.

[119] *See* 4 C.F.R. Parts 101-105.

parties with an opportunity to obtain C block licenses at the market value of the licenses prevailing at the time of the reauction. The amnesty option we adopt today is equitable to all parties because, while amnesty relieves a licensee from further debt obligations and any applicable default payments, a coordinated surrender of licenses facilitates expeditious reauctioning of the spectrum and will provide new market opportunities for all eligible entities. In addition, we note that rapid reauction of those licenses surrendered will also comply with the Congressional directive that we promote competition and participation in the telecommunications industry by small businesses.

54. A C block licensee must make the amnesty election in accordance with the procedures set forth in Section E, *infra*. The Commission will reauction those licenses surrendered on an expedited basis under the reauction rules discussed in the *Further Notice of Proposed Rule Making* adopted with this *Second Report and Order*. *See* Section V., *infra*. Licensees electing the amnesty option will be eligible to bid for any and all licenses at the reauction.

55. Licensees electing the amnesty option will not have their down payment returned. This will discourage speculation and ensure that all bidders, new entrants as well as existing licensees, participate in the reauction without undue advantage. Retention of the down payments -- 10% of the bid price for most licensees -- is consistent with our previous decisions and actions affecting C block bidders in that we have retained any payments made by those C block bidders who have failed to

make their first or second down payments.[120] We believe that by not finding these licensees in default and assessing any applicable default payments, we are according them a substantial benefit. In forgiving the outstanding debt we afford significant relief to the licensees by allowing them to avoid anticipated defaults. In addition, these licenses will not be deemed in default or delinquent in meeting government debt obligations. Nor will they be subject to any applicable default payments or in violation of any FCC rules or license conditions. Thus, their creditworthiness, financial qualifications, and other qualifications are preserved should they wish to take part in other federal loan programs[121] or apply for any future spectrum

---

[120] *See*, Mountain Solutions LTD, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B053, B168, B172, B187, B188, B224, B247, B275, B366, and B381, *Order*, 12 FCC Rcd 5904 (1997) (*application for review filed May 28, 1997 pending*); Carolina PCS I Limited Partnership, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B016, B072, B091, B147, B177, B178, B312, B335, and B436, Order, DA 97-890 (rel. April 28, 1997) (*application for review filed May 28, 1997 pending*); C.H. PCS, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules, Order, 11 FCC Rcd 9343 (1996); BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, 12 FCC Rcd 3230 (1997), petition for reconsideration granted in part and denied in part, *Memorandum Opinion and Order*, FCC 97-300 (rel. Sept. 29, 1997).

[121] Under the Debt Collection Improvement Act ("DCIA"), no person may obtain any federal financial assistance if the person has an outstanding debt with any federal agency which is in a delinquent status. Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3720B. In addition, in the Part 1 Proceeding, the Commission adopted a certification procedure as part of changes to the application procedures whereby applicants must certify that the applicant is not in default on any payment for Commission licenses (including down payments) and that it is not delinquent on any non-tax debt owed to any federal agency. Bidders who cannot make this certification may be ineligible for installment payment

auctions or licenses.[122]

56. Subject to one exception identified below, licensees choosing to take advantage of the amnesty option will be required to surrender all of their licenses to the Commission. The requirement that *all* licenses be surrendered precludes licensees from "cherry picking." The simultaneous multiple-round auction design enables bidders to place bids on many licenses at once and to aggregate desired licenses in a manner that facilitates workable business plans. If we were to permit licensees to "cherry pick" which licenses to surrender, the interdependency of the licenses would be harmed. Licenses surrendered pursuant to such a "cherry picking" scheme might lack the potential for beneficial aggregation within MTAs, and therefore would likely be less valuable to potential bidders and impair business plans of new investors.

57. As an exception to the "all-or-nothing" requirement, licensees that have met or exceeded the five year build-out requirements by September 25, 1997, the date of adoption of this *Second Report and Order*, will not be required to surrender licenses for built-out markets. In addition, these licensees will be permitted to retain those BTA licenses in which such build-out has occurred. However, licensees availing themselves of this exception may not pick and choose BTAs within an MTA but will be required, instead, to keep all of the other BTAs in the MTA in which the build-out requirement has been met and to pay for those licenses under the terms of their Notes. The build-out exception facilitates the achievement of the statutory goal set forth in Section 309(j) that we encourage the rapid

---

plans. Part 1 Proceeding at p 8.

[122] *See* 47 U.S.C. §§ 308(b), 309(j)(5).

provision of service to the public, and responds to the needs of licensees that have already commenced operations or have otherwise invested significantly in certain of their C block licenses. The Commission has an interest in minimizing the competitive impact of the changes that it makes to the auction rules, consistent with its broader policy objectives. The exception we adopt today is one method by which we can ensure that the menu of options available to the C block is fair to those licensees that have rapidly built-out their markets and initiated provision of competitive service.

58. Although the Bureau suspended installment payments on C block licenses on March 31, 1997, some licensees made their installment payments (*i.e.*, installments due on that date, and amounts due on December 31, 1996, but not paid until March 31, 1997, based on our automatic 90-day non-default rule) after the suspension. In addition, prior to the suspension of payments, many C block licensees made their regularly scheduled installment payments. We believe that due to the actions we take in this *Second Report and Order*, it would be unjust and inequitable for C block licensees to be treated differently merely because some C block licensees made prior payments while others did not. Consequently, we direct the Wireless Telecommunications Bureau to refund any installment payments made (whether due on or before March 31, 1997) on any license that is surrender pursuant to this *Second Report and Order*. In addition, we will forgive payment of any due, but unpaid, installment payments for any surrendered license.[123] For licensees exercising the build-out exception and retaining certain licenses, all previously made installment payments will

---

[123] Forgiveness of this obligation will be subject to coordination with the Department of Justice pursuant to applicable federal claims collections standards. *See* 4 C.F.R. Parts 101-105.

be applied first to reduce the Suspension Interest applicable to those licenses, and any amounts remaining will be refunded.

D. Prepayment

59. *Background.* In the *Installment Public Notice*, the Bureau sought comment on whether PCS licensees should be permitted to prepay their installment debt at a discount, and on proposals for calculating the net present value of the debt.[124] In his presentation at the FCC Public Forum held on this issue, John Bensche of Lehman Brothers recommended prepayment by bidders as a way to avoid further restructuring in the future and to remove the government from its role as creditor to the wireless industry.[125] Bear Stearns also indicates that a prepayment option will improve the financial flexibility of C block licenses by eliminating the uncertainty surrounding the threat that a license will be revoked for financial reasons because lenders could collateralize their obligations with the licenses, at least indirectly, using the shares of the license-holding entity.[126]

60. Other commenters also support some form of prepayment option for C block licensees.[127] In a letter dated September 16, 1997, Representatives Edward J. Markey and W.J. "Billy" Tauzin urged the Commission to consider a "full price buy-out" proposal as part of a menu of options approach.

---

[124] *See Installment Public Notice* at n.6.

[125] Presentation by John Bensche of Lehman Brothers at June 30, 1997, FCC Public Forum on Installment Payment Issues at 3. *See also* NextWave Comments at 9; GWI Reply Comments at 13-14.

[126] *See* Bear Stearns Comments at 4.

[127] *See, e.g.*, ClearComm Comments at 3.

Under this proposal, licensees could purchase at "full price" as many of their existing licenses as they desire with cash up front, for the net present value of the net bid prices for such licenses. They suggested that the licensees be allowed to use any monies on deposit with the Commission and any "new money" that the licensee may immediately muster. They agreed that this option had the benefit of allowing licensees to proceed with build-outs immediately, thereby bringing service to the public as quickly as possible, while also providing a meaningful opportunity for all interested parties to participate in an auction for the bulk of the licenses.[128]

61. Many commenters argue that a prepayment option should include a discount to lower the net high bid price of the licenses below A and B block prices.[129] For example, NextWave believes that a discount to A and B block prices is necessary due to the headstart that A and B block licensees have experienced in time to market, coupled with the restraints of the C block control group rules and the deterioration of the financial market conditions for wireless companies.[130] Other commenters believe that a prepayment discount should reflect the average of D and E block winning bids, with a multiplier of 2.25 applied to secondary and tertiary markets and 3.0 for top 100 markets.[131] In its *ex parte* letter, Triumph Capital suggests that the Commission apply a discount ranging from 15 percent

---

[128] *See* The Honorable W.J. "Billy" Tauzin and the Honorable Edward J. Markey, *ex parte* letter, September 16, 1997.

[129] *See, e.g.*, ClearComm Comments at 3; Horizon Comments at 10-12; RTFC Comments at 3; Holland Comments at 3-4; Duluth PCS Comments at 1-2; GWI Comments at 8-10; NextWave Comments at 9-10. *See also* Alpine *ex parte* letter, September 23, 1997.

[130] NextWave Comments at 9-10 and Reply Comments at 22.

[131] Duluth PCS Reply Comments at 1-2.

to 30 percent to determine the present value of C block debt to the FCC.[132] GWI proposes to scale the C block bid using the ratio of the A/B block average cash bid to C block average bid. This scale factor would then be multiplied by the actual C block bid for that license to determine the scaled C block cash bid.[133] This scaled C block bid would then be discounted at a 14 percent discount rate for the government debt to determine the prepayment price.[134] NextWave suggests that a two- year period would be necessary for licensees to fund this prepayment as well as sustain operating expenses.[135]

62. Cook Inlet Region argues that any discounting of the net high bid price for purposes of prepayment would be unfair to the losing bidders in the C block auction and investors and creditors of the bidders in the auction.[136] Omnipoint also believes that a prepayment option is discriminatory against all of the winning bidders except the very large.[137] AirGate Wireless believes that permitting licensees to pay the net present value of their license costs at a discount would have the effect of rewriting the outcome of the C block auction, denying licenses to bidders who expressed through their bids a willingness to pay more than a discounted bid, and thereby arbitrarily choosing winners and losers.[138] Additionally, the

---

[132] *See* Frederick W. McCarthy, Chairman, Triumph Capital to The Honorable Reed E. Hundt, Chairman, Federal Communications Commission *ex parte* letter, September 23, 1997 ("McCarthy Letter").

[133] GWI Comments at 10-12.

[134] GWI Comments at 9. *See also* Bear Stearns Comments at 3.

[135] NextWave Comments at 10.

[136] Cook Inlet Region *ex parte* letter, September 32, 1997 at 2.

[137] Omnipoint *ex parte* letter, September 23 1997 at 2.

[138] *See* AirGate Wireless *ex parte* letter, July 18, 1997 at 3.

SBA does not support a discount in the net bid amounts.[139] The SBA indicates that absent a detailed analysis of the bidders, the bidding process, round activity, financial environment and marketplace circumstances during each of the auctions, including a regression analysis to isolate individual factors, it cannot be determined that the adjusted marketplace value of C block should be based on either A and B block or D-F block bid amounts.[140] The SBA also indicates that "a reduction in principal would seriously undermine the integrity of the auction as well as set a dangerous precedent for small business participation in future auctions."[141]

63. Other commenters argue that a prepayment option is not viable for small businesses, or that it is otherwise inappropriate. BIA Capital contends that a prepayment option is not feasible because it would require small businesses to trade in debt capital from the government, which costs 7%, for private equity, which has a capital cost ranging from 30% to 40%.[142]

64. *Discussion*. Under the prepayment option we adopt, any C block licensee may prepay selective licenses subject to the restrictions described in this Subsection IV.D. All licenses that are not prepaid in accordance with this option must be surrendered to the Commission in exchange for a forgiveness

---

[139] *See* Jere W. Glover, Chief Counsel, U.S. Small Business Administration and Jenell S. Trigg, Assistant Chief Counsel, Telecommunications, to The Honorable Reed E. Hundt, Chairman, Federal Communications Commission,*ex parte* letter, September 8, 1997 ("Glover Letter").

[140] *Id.* at 5.

[141] *Id.*

[142] BIA Capital Comments at 2-3.

of the corresponding debt and any penalties. A licensee selecting this option may apply 70% of the total of all down payments it made on the licenses that it elects to surrender to the Commission ("Available Down Payments"), to a prepayment of the Notes for as many of its licenses it wishes to keep.[143] The remaining down payments not applied to prepayment will be retained by the Commission. Additionally, an incumbent may use any "new money" to prepay as many of its own licenses as it desires. Any installment payments previously made by the licensee for all its licenses will be added to the Available Down Payments to increase the funds available to prepay its Notes. Interest accrued from the date of the conditional license grant through the Election Date will be forgiven. For purposes of this option, the down payment associated with licenses that are transferred as of the Election Date to subsidiaries or affiliates will be considered transferred with the licenses and the corresponding debt.[144]

---

[143] For example, if a licensee held two licenses with net high bids of $100 and $200, then the total down payments would equal $30 ($10 + $20). If the licensee elected to keep the $200 license, the licensee would have $7 ($10 x 70 percent) of its down payment from the $100 license to apply towards the prepayment of the $200 license's Note. If, on the other hand, the licensee elected to prepay the $100 license, then the licensee would have $14 ($20 x 70 percent) of its down payment from the $200 license to apply towards the prepayment of the $100 license's Note.

[144] For example, if ABC Company paid $100,000 each for two licenses and submitted $10,000 in down payments for each license, the total down payments submitted by ABC Company would be $20,000. However, if ABC had subsequently transferred one of its licenses to XYZ Company, a wholly-owned subsidiary, ABC Company would not have any additional money available to purchase its license, and XYZ Company would not have any additional money available to purchase its license. This option, however , is not intended to prohibit additional license transfers consistent with existing Commission rules.

65. We believe that this prepayment option fairly balances competing interests, while maintaining the fairness and integrity of our rules and auctions. We note that 30% of the down payments is equal to 3% of the net high bids and is consistent with the approach adopted previously for down payments.[145] Under our existing rules, an applicant is subject to a 3% payment if it fails to make the required down payment.[146] Furthermore, previously we have indicated that these payments will discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements.[147] In this manner, we believe it to be most fair to apply this provision to those licensees who seek the relief provided by this option. If licensees were able to use all of their down payment, they would recoup in full what they paid, and there would be no deterrent effect against bidding excessively in the auction or otherwise gaming the process. Thus, in the next auction to which our default payments apply, these rules could be ignored with impunity. Such a result

---

[145] *See* BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Order, 11 FCC Rcd 14399 (1996) (assessing a $67,695,653.23 default payment for failure to submit the required down payment for licenses won in the C block auction), *reconsideration denied*, *Order*, 12 FCC Rcd 6606 (1997); and C. H. PCS, Inc., BTA No. B347 Frequency Block C, Order, 11 FCC Rcd 22430 (1996) (assessing a $5,031,232.50 default payment for failure to submit the required down payment for one license won in the C block reauction).

[146] *See* 47 C.F.R. §§ 1.2104(g)(2), 24.704(a)(2). The defaulted bidder in this instance is subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission, plus a payment equal to three percent of the defaulted bid price. *See* 47 C.F.R. § 24.704(a)(1), (2). *See also*, *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 4495 at n.51.

[147] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2383.

would severely harm our market- based auction program. It would make it impossible to impose the charges we already have imposed in past cases, including in C block cases.[148] Further, we emphasize that permitting C block licensees access to the down payments they previously made for licenses they no longer wish to retain is a substantial benefit and fair to these licensees. To allow them to use 100% of those funds would be unfair to other C block licensees who choose to continue to pay under their existing obligations, and to bidders who were unsuccessful in the auction.

66. While some have argued that C block licensee loan payoffs made under a prepayment plan should be determined using a net present value formula, we decline to discount the Notes. We believe it is fair to other bidders and to the credibility and integrity of our rules for the prepayment to be in the amount of the outstanding debt for the net high bid. In other words, licensees should pay what they bid. To offer deep discounts off the amount of the debt is outside normal commercial practices and otherwise appears to be a "bail-out" of C block licensees who have encountered financial difficulties long after the auction was completed and the financial commitments were made. Debt paid off in advance of the maturity date allows the debtor to reap the benefit of not incurring additional interest due on the principal amount owed. To discount the amount of the principal, as has been suggested, would unfairly permit a windfall to the licensee electing this option. While we are cognizant of the financial difficulties for some C block licensees, we are also mindful of our duty to the other C block licensees who are successfully meeting their obligations and continuing build-out efforts for wireless services. Therefore, we believe that we strike the proper

[148] *See* n.145, *supra*.

balance by allowing a licensee the benefit of prepaying its debt obligations, thereby reducing the amount of interest that would be payable over the full term of the Note, while avoiding fundamental changes to our rules that unfairly harm other licensees who followed our rules and who continue to meet their payment obligations.

67. Under this prepayment option, an incumbent must prepay all of the BTA licenses in a particular MTA and cannot arbitrarily select individual BTA licenses in a given MTA to prepay while surrendering other licenses in that MTA, with one exception. We conclude that while a licensee must prepay the debt on all of the BTAs for which it holds licenses in an MTA, we recognize that a licensee may not have sufficient funds available to it to prepay all of its Notes for the BTA licenses in a given MTA. Therefore, any licensee that has enough funds on hand to prepay one or more BTAs within an MTA, but not enough for the entire MTA, must prepay all of those BTAs within that MTA that it can afford. We conclude that a requirement that all licenses in a given MTA be prepaid precludes licensees from "cherry picking." The simultaneous multiple-round auction design discussed in paragraphs 86-89, *infra*, enables bidders to place bids on many licenses at once. If we were to permit licensees to "cherry pick" which licenses in an MTA to prepay and which to surrender under this option, the interdependency of the licenses would be threatened. Licenses surrendered pursuant to such a "cherry picking" scheme would lack the potential for aggregation, and consequently would hold much less value to other bidders in the subsequent reauction.

68. We decline to provide an exception for markets in which the five-year build-out requirement has been met as provided under the amnesty option. Under the prepayment

option, licensees have the flexibility to select which markets they will retain subject to the restrictions in paragraph 67, *supra*. For this reason, licensees have the option of selecting and prepaying for licenses where they have invested capital to meet the build-out requirements and not prepaying in an MTA where they have not. We believe that this flexibility, compared to the all or nothing approach of simple amnesty, mitigates the need for this exception.

69. Finally, for a period of two years from the start date of the reauction, licensees (defined as qualifying members of the licensee's control group, and their affiliates) will be prohibited from reacquiring the licenses surrendered pursuant to this option either through a reauction or any other secondary market transaction. We do not believe that it would be fair to other licensees and bidders for these licensees to benefit from a reauction of those licenses after taking advantage of this option. Furthermore, we do not believe that this option should provide opportunities for licensees to "selectively" reduce their license obligations by surrendering a license in hopes of re-obtaining it in a reauction at a lower price.

E. Election Procedures

70. We conclude that a licensee electing to continue under its existing installment payment plan or electing one of the options set forth in this *Second Report and Order*, must file a written notice of such election with the Wireless Telecommunications Bureau on or before the Election Date ("Election Notice") as specified in this section. As used herein,

"Election Date" means January 15, 1998.[149]

71. We require that those licensees electing (i) to continue making payments under their original C block Notes, (ii) the disaggregation option, or (iii) the amnesty option who elect to take advantage of the build-out exception and retain certain of their licenses make the appropriate payment by March 31, 1998 (or by the end of the 60-day grace period allowed, see paragraph 25, *supra*), and execute any necessary financing documents pursuant to appropriate requirements and time frames established by the Bureau in order to continue to be eligible under the option chosen.

72. *Continuation Under Existing Note(s).* Any licensee that wishes to continue making installment payments in accordance with the terms of its original C block Note, must elect to do so by submitting the Election Notice of such election.

73. *Disaggregation.* For licensees electing the disaggregation option, the Election Notice must include (i) a list of all licenses being disaggregated, (ii) the original of all licenses being disaggregated, and (iii) all originals of the Notes and Security Agreements for those licenses being disaggregated for cancellation by the Commission. Upon acceptance of the Election Notice, the disaggregated spectrum will be deemed returned to the Commission.

74. *Amnesty.* For licensees electing the amnesty option, the Election Notice must include (i) a list of all licenses being

---

[149] See paragraph 110, *infra*. The Wireless Telecommunications Bureau will provide more information concerning filing procedures in a subsequent public notice.

surrendered, (ii) if applicable, a statement indicating that it intends to avail itself of the build-out exception together with a list of those BTA licenses it intends to retain[150] and pertinent information concerning build-out pursuant to the Commission's rules,[151] (iii) the original of all licenses being surrendered, and (iv) all originals of the Notes and Security Agreements for those licenses being surrendered for cancellation by the Commission.

75. Prepayment. For licensees electing the prepayment option, the Election Notice must include (i) a list of all licenses being prepaid, (ii) a payment in the amount of any additional "new money" a licensee desires to apply to the prepayment of its licenses, (iii) the original of all licenses not being prepaid in accordance with this option, and (iv) all originals of the Notes and Security Agreements for those licenses not being prepaid for cancellation by the Commission. Notes which are prepaid will be marked "Paid-In-Full" and returned to the licensee.

76. We further conclude that any C block licensee that (i) fails to elect one of the options set forth, Section IV.A.-D., *supra* on or before the Election Date, or (ii) fails to elect on or before the Election Date to continue making payments under its original C block Note(s), or (iii) fails to fully and timely execute and deliver to the Commission (or its agent) any required financing documents within the period of time specified by the Bureau, will not be afforded the opportunity granted to licensees who do make a timely election to repay the

---

[150] Those licensees electing to proceed under the build-out exception will be required to adhere to the specific obligations set forth in their Notes and Security Agreements, as modified for those licenses not being surrendered to the Commission. *See* discussion in Section IV.E., *supra*.

[151] 47 C.F.R. § 24.203(c).

Suspension Interest over a period of eight equal payments. In such event, the licensee will be required, on or before March 31, 1998, to make all payments that would have been due under its Note(s) but for the effect of the *Suspension Order*. For example, a licensee whose regular installment due date was March 31, 1997, who did not make payment on that date because of the *Suspension Order*, will owe on March 31, 1998, all payments that were due and payable earlier, but unpaid due to the *Suspension Order*, in addition to the regularly scheduled March 31, 1998, payment.

F. Cross Defaults

77. *Background*. In the *Notice of Proposed Rule Making* in this proceeding, we sought comment on whether the Commission should cross default its installment payment plan loans with other installment payment plan loans to the same licensee.[152] We asked if we should cross default licensees across services or blocks (*e.g.*, from PCS licenses to SMR licenses, or from PCS C and F block licenses), whether we should pursue default remedies against single licenses only (*e.g.*, from C block to C block licenses only), and what factors should influence our decision to pursue cross defaults. In response, several commenters specifically requested that the Commission clarify its rules regarding cross default in the context of defaults on installment payments if licenses are held by licensees with the same or overlapping control groups.[153]

78. Further, several commenters request the Commission

---

[152] *See Part 1 Proceeding* at pp 76-78.

[153] *See, e.g.*, ClearComm Reply Comments at 4; BIA Capital Comments at 4.

to affirmatively decide that there will be no cross default.[154] BIA Capital states that one perceived disincentive to providing financing to C block licensees is cross default.[155] In this regard, BIA Capital suggests that the Commission quickly clarify its position on cross defaults, and recommends that a default on payments for some licenses not result in cross default on other licenses which the company is using successfully.[156] ClearComm agrees and urges the Commission to allow licensees to place their licenses in separate entities so that potential financiers may invest in specific markets that meet their investment criteria.[157] AmeriCall and Hughes Network Systems state the effectiveness of the disaggregation option can be assured if the Commission clarifies that it will not pursue cross defaults.[158] AmeriCall and Hughes Network Systems state most regional equity funds are unwilling to look at this sector until they are reassured that their investment in one state is sheltered from events in other states that would impact licenses in those different markets.[159]

79. *Discussion*. We will not pursue cross default remedies against C block licensees who default on installment payments with regard to other licenses in the C or F blocks. For example, if a licensee defaults on a C block license and that licensee holds other C block licenses on which it is making its

---

[154] *See, e.g.*, AmeriCall *ex parte* letter, July 11, 1997; Magnacom *ex parte* letter, August 13, 1997.

[155] BIA Capital Comments at 4.

[156] *Id.*

[157] ClearComm Reply Comments at 4.

[158] AmeriCall and Hughes Network Systems, Inc.,*ex parte* letter, September 16, 1997 at 2.

[159] *Id.*

payments, we will not declare it to be in default on its debt associated with the other C block licenses. Similarly, if a licensee defaults on a C block license, and also holds F block licenses on which it is making its payments, we will not declare it to be in default on its F block debt.

80. This decision is warranted in light of our efforts to provide current C block licensees who are experiencing financing difficulties with options for meeting their financial obligations to the Commission.[160] We emphasize that our decision only addresses the context of a licensee's default on an installment payment for a C block license upon other licenses held by that licensee in the C or F blocks. We defer to completion of the Part 1 Rule Making our decision on whether to amend more comprehensively our policy of cross defaults. We also emphasize that existing installment payment default rules and license conditions will continue to apply for those particular licenses in default after March 31, 1998. Accordingly, upon default, a license will automatically cancel and the Commission will initiate debt collection procedures against the licensee and accountable affiliates.[161]

---

[160] This decision does not affect our policy with regard to defaults on first or second down payments. *See* Letter to Kenneth Hobbs from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, DA 97-260 (rel. February 4, 1997). *See also* BDPCS, Inc. Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's *Rules, Memorandum Opinion and Order*, 12 FCC Rcd 3230 (1997).

[161] 47 C.F.R. § 1.2110(e)(4)(iii). *See also* 31 U.S.C. Chapter 37; 4 C.F.R. Parts 101-105; 47 C.F.R. Part 1, Subpart O.

V. FURTHER NOTICE OF PROPOSED RULE MAKING

A. Proposals Regarding the Reauction of Surrendered Licenses

81. *Background.* Several commenters suggest that a reauction of C block licenses in the best method by which the Commission can place C block licenses in the hands of licensees capable of constructing systems and offering service to the public rapidly. Triumph Capital, MCI, and Cook Inlet Communications all support a reauction within four to six months.[162]

82. *Discussion.* Under the options adopted above, licensees have three options for the surrender of licenses or spectrum to the Commission. A reauction of licenses will assure rapid provision of service to the public. A reauction also will ensure that these licenses are available to all applicants in a rapid and fair fashion. A simultaneous reauction of all the licenses turned in to the Commission will benefit all bidders because they will be able to bid for a number of licenses in a single reauction, instead of a series of piecemeal auctions after defaults and revocations, in which opportunities for aggregation might be less favorable.

1. *Licenses to be reauctioned*

83. We propose that the reauction include the following licenses: (1) all licenses representing the disaggregated spectrum surrendered to the Commission under the

[162] Triumph Capital *ex parte* letter, August 7, 1997 at 1; MCI *ex parte* letter, August 14, 1997 at 2-3; Cook Inlet Communications *ex parte* letter, August 5, 1997 at 3.

disaggregation option; (2) all licenses surrendered to the Commission on or before January 15, 1998, by incumbent licensees who choose to take advantage of the Commission's prepayment or amnesty options; and (3) all PCS C block licenses currently held by the Commission as a result of previous defaults. By including all available licenses in the reauction, the Commission can efficiently and fairly speed service to the public. In addition, offering all available licenses will allow for the most efficient aggregation of licenses. We seek comment on this proposal.

2. *Eligibility for Participation*

84. As we stated in the *Second Report and Order*, all entrepreneurs, all entities that applied for the original C block auction, and all current C block licensees with exceptions, are eligible to bid in the reauction. We seek comment on whether we should restrict participation in the reauction to entities that have not defaulted on any FCC payments.[163] Should we presume that an entity's prior default on payments for an FCC license or authorization makes that entity not financially or otherwise fit to acquire a reauctioned C block license? Alternatively, we could review financial qualifications through several other means. For instance, we could allow such entity to participate in an auction, but if the applicant is a winning bidder, set for expedited hearing the financial qualifications of the bidder, and allow the applicant to rebut a presumption that it is not financially qualified.[164] Another alternative would be to request that the entity submit more detailed financial information at the application stage, or require that the entity

[163] *See* 47 U.S.C. § 309(j)(5).

[164] *See* 47 C.F.R. §§ 24.832(e), 1.2108(d)(3).

submit a higher upfront payment amount (*e.g.*, a 50% upfront payment requirement) to participate in the reauction. With regard to C block licensees who elect the disaggregation, amnesty, or prepayment options adopted in the *Second Report and Order*, we observe that by making such election and related payments they are not in default on their C block licenses and, thus, would not be restricted from participation in the reauction (except as otherwise set forth in the *Second Report and Order*).

3. *Reauction Procedures*

85. We propose below auction design and application procedures for the reauction of C block licenses.

a. *Competitive Bidding Design*

86. We propose that all licenses and spectrum surrendered to the Commission be awarded by means of a simultaneous multiple-round electronic auction. We base this proposal on our desire to quickly auction available licenses and thereby to promote the most efficient assignment of the spectrum. Consistent with our normal practice, the specific procedural requirements of the auction would be set out by Public Notice prior to the auction. In general, we have indicated that the auction procedures chosen for each service should be those that will best promote the policy objectives identified by Congress.[165] We further concluded in the *Competitive Bidding Second Report and Order* that in most cases the goals set forth in Section 309(j) will be best achieved by designing auctions that award authorizations to the parties that value them most highly. As we explained, such parties are most likely to deploy new technologies and services rapidly, and to promote the

[165] 47 U.S.C. § 309(j)(3).

development of competition for the provision of those and other services.[166]

87. Also, multiple-round bidding during the auction will provide more information to bidders about the value of licenses than single round bidding. With better information, bidders have less incentive to shade their bids downward in order to avoid the "winner's curse," that is, the tendency for the winner to be the bidder who most overestimates the value of the item being auctioned.[167] Finally, multiple-round bidding is likely to be fairer than single-round bidding. Every bidder has the opportunity to win if it is willing to pay the most for it. Thus, we tentatively conclude that multiple-round bidding would be the best method of auctioning all available licenses and we seek comment on this tentative conclusion.

88. We also tentatively conclude that all surrendered C block licenses should be awarded in a single simultaneous multiple-round auction. A single simultaneous auction will facilitate any aggregation strategies that bidders may have, and it would provide the most information to bidders about license values at a time that they can best put that information to use. We seek comment on this tentative conclusion.

89. Finally, if we adopt simultaneous multiple-round bidding as our method of auctioning all available licenses, we tentatively conclude that bidding should be allowed only by electronic means, rather than by telephone. Given our desire to conduct the reauction quickly, as well as recent improvements in our electronic bidding software, we tentatively conclude that

[166] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2360.

[167] *Id.* at 2362.

telephonic bidding should be permitted only in exceptional circumstances, to be determined by the Wireless Telecommunications Bureau in each instance.

b. *Bidding Procedures*

90. Subject to the exceptions discussed below, which are designed to speed the reauction process, we tentatively conclude that the reauction should be conducted in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q of the Commission's rules,[168] as revised,[169] and substantially consistent with the auctions that have been employed in other wireless services. We also propose to use our Part 24 rules applicable to the C block to the extent that such rules do not conflict with our Part 1 rules or rules specifically adopted or proposed in this *Second Report and Order and Notice of Proposed Rule Making* for the reauction of C block licenses. Specifically, except as set forth herein, we propose to apply the Part 1 rules regarding competitive bidding mechanisms,[170] bidding application and certification procedures and prohibition of collusion,[171] submission of upfront payment, down payment and filing of long-form applications,[172] procedures for filing long form applications,[173] and procedures

---

[168] 47 C.F.R. Part 1, Subpart Q.

[169] We initiated a proceeding last February to revise our Part 1 rules. *See Part 1 Proceeding*.

[170] 47 C.F.R. § 1.2104.

[171] 47 C.F.R. § 1.2105.

[172] 47 C.F.R. §§ 1.2106, 2.2107.

[173] 47 C.F.R. § 1.2108.

regarding license grant, denial and default.[174] We seek comment on this proposal.

91. *Activity Rules*. We tentatively conclude that, as we have done in other simultaneous multiple-round auctions, we will conduct the reauction in three stages. Three stages, with bidders required to be more active in each stage, serves to provide bidders with the flexibility to pursue backup strategies as the auction progresses. However, because we believe that efficiently assigning these licenses for rapid service to the public and increased competition in the CMRS marketplace requires a swift reauction of the licenses, we propose to use high activity requirements in the reauction. In recent auctions, for example, we have required bidders to be active on 80% of their eligible licenses in Stage I, 90% in Stage II, and 98% in Stage III. We propose to use similar activity levels in the C block reauction and, to further expedite the auction, require the Bureau to use its delegated authority to aggressively schedule bidding rounds, quickly transition into the next stage of the auction when bidding activity falls, and use higher minimum bid increments for very active licenses. We seek comment on these proposals and tentative conclusions.

92. *Reserve Price, Minimum Opening Bid, and Minimum Bid Increments*. Section 1.2104 of our rules provides that the Commission may establish reserve prices or suggested minimum opening bids.[175] The Balanced Budget Act directed the Commission to prescribe methods by which a reasonable reserve price will be required or a minimum opening bid will be established, unless the Commission determines that a

---

[174] 47 C.F.R. § 1.2109.

[175] 47 C.F.R. § 1.2104(d).

reserve price or a minimum opening bid is not in the public interest.[176] This legislative directive establishes a presumption in favor of reserve prices or minimum opening bids in the reauction. A minimum opening bid is the minimum bid price set at the beginning of the auction below which no bids are accepted. Customarily, an auctioneer has the discretion to lower a minimum opening bid in the course of the auction. A minimum opening bid in the C block reauction, more than a reserve price, will help make certain that the public is fairly compensated for spectrum surrendered to the Commission, expedite the auction and give us the flexibility to make adjustments based on the competitiveness of the auction. We seek comment on this proposal. We also seek comment on the methodology we should use to establish minimum opening bids and what factors we should consider in doing so. We propose minimum opening bids for each market equal to 10% of the corresponding high bid for the market in the original C block auction. Such an approach will scale the minimum opening bids in a way that reflects the relative value of the licenses. We also ask that commenters address whether the amount of the minimum opening bid should be capped to ensure that bidding is not deterred on high valuation markets, in particular. Finally, if commenters believe that a minimum opening bid equal to 10% of the high bid in the original C block auction will result in substantial unsold licenses, or is not a reasonable amount, they should explain why this is so, and comment on the desirability of a higher or lower minimum opening bid.

---

[176] Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997) (to be codified at 47 U.S.C. § 309(j)(4)(F)) ("Balanced Budget Act").

c. *Procedural and Payment Issues*

93. *Pre-Auction Application Procedures.* Auction applicants are required to file a short-form application, FCC Form 175, prior to the start of each auction.[177] Although we have previously allowed both electronic and manual filing of such applications, we tentatively conclude that we should require electronic filing of all short-form applications for the reauction. We believe that electronic filing of applications would serve the best interests of auction participants as well as the members of the public monitoring the reauction. We also believe that an electronic filing requirement will help ensure that the reauction will be completed within the time frame contemplated by this *Further Notice of Proposed Rule Making*. We have developed user- friendly electronic filing software and Internet World Wide Web forms to give applicants the ability to easily and inexpensively file and review applications. This software helps applicants ensure the accuracy of their applications as they are filling them out, and assists them in avoiding errors and omissions. In addition, by shortening the time required for the Commission to process applications before the auction, electronic filing will increase the lead time available to applicants to pursue business plans and arrange necessary financing before the short-form deadline. Our experiences from recent auctions show that bidders are confident that the electronic filing system is reliable. For example, in the broadband PCS D, E, and F block auction, 94% of the qualified bidders filed their short-form applications electronically. In the recently completed WCS auction, all winning bidders filed their long-form applications electronically. In addition, we note that in the *Part 1 Proceeding*, we tentatively concluded that Sections 1.2105(a)

---

[177] *See* 47 C.F.R. §1.2105(a).

and 1.2107(c) of our rules should be amended to require electronic filing of all short-form and long-form applications.[178] We seek comment on this tentative conclusion.

94. *Upfront Payment*. The Part 1 rules require the submission of an upfront payment as a prerequisite to participation in spectrum auctions.[179] We propose to set the amount of the upfront payment for the reauction at $.06 per MHz per pop. We adopted the same upfront payment amount for our most recent broadband PCS auction, the D, E, and F block auction, in which all applicants for all blocks made a $.06 per MHz per pop upfront payment.[180] In the *Competitive Bidding Second Report and Order*, we indicated that the upfront payment should be set using a formula based upon the amount of spectrum and population (or "pops") covered by the license or licenses for which parties intend to bid.[181] We reasoned that this method of determining the required upfront payment would enable prospective bidders to tailor their upfront payment to their bidding strategies.[182] At the same time, however, we noted that determining an appropriate upfront payment involved balancing the goal of encouraging bidders to submit serious, qualified bids with the desire to simplify the bidding process and minimize implementation costs imposed on bidders.[183] We concluded that the best approach would be to maintain the flexibility to determine the

---

[178] *Part I Proceeding* at p 46.

[179] *See* 47 C.F.R. § 1.2106.

[180] 47 C.F.R. § 24.716(a)(1).

[181] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377-78.

[182] *Id.* at 2377.

[183] *Id.* at 2378.

amount of the upfront payment on an auction-by-auction basis because this balancing may yield different results depending upon the particular licenses being auctioned.[184] In light of the our desire that only serious, qualified applicants participate in the reauction, our proposal of a $.06 per MHz per pop is appropriate. We seek comment on this proposal. We also seek comment on alternative methods of establishing an upfront payment, and in particular, on how the Commission may estimate the present market value of the spectrum to be auctioned.

95. *Down Payment and Full Payment*. Consistent with the procedures used in prior auctions, we tentatively conclude that every winning bidder in an auction should be required to tender a down payment sufficient to bring its total amount on deposit with the Commission up to 20% of its winning bid within 10 business days after the issuance of a public notice announcing the winning bidder for the license.[185] We seek comment on this tentative conclusion.

96. If a winning bidder makes its down payment in a timely manner, we propose that it file an FCC Form 600 long-form application and follow the long- form application procedures in Section 1.2107 of the Commission's rules.[186] After reviewing the winning bidder's long-form application, and after verifying receipt of the winning bidder's 20% down payment, the Commission would announce the application's acceptance for filing, thus triggering the filing window for petitions to deny. We note that the Balanced Budget Act of

---

[184] *Id.*

[185] *See* 47 C.F.R. § 1.2107(b).

[186] *See* 47 C.F.R. § 1.2107. *See also*, 47 C.F.R. § 24.707.

1997 authorizes the Commission to establish a shortened period for the filing of petitions to deny.[187] In light of this authority, as well as our desire to conclude the reauction process as quickly as possible, we propose that parties then have 15 days following public notice that an application was accepted for filing to file a petition to deny. If, pursuant to Section 309(d) of the Communications Act, the Commission dismisses or denies any and all petitions to deny, the Commission would announce by public notice that it is prepared to award the license, and the winning bidder would then have 10 business days to submit the balance of its winning bid. If the bidder does so, the license would be granted. If the bidder fails to submit the required down payment or the balance of the winning bid or the license is otherwise denied, we would assess a default payment as discussed below. We seek comment on these proposals.

97. *Amendments and Modifications of Applications*. To encourage maximum bidder participation, we propose to allow applicants to amend or modify their short-form applications as provided in Section 1.2105.[188] In the broadband PCS context, we modified our rules to permit ownership changes that result when consortium investors drop out of bidding consortia, even if control of the consortium changes due to this restructuring.[189] We propose to adopt the same exception to our rule prohibiting major amendments in the reauction. We seek comment on these proposals.

---

[187] Balanced Budget Act.

[188] 47 C.F.R. § 1.2105.

[189] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fourth Memorandum Opinion and Order*, 9 FCC Rcd 6858, 6868 (1994).

98. *Bid Withdrawal, Default and Disqualification*. We tentatively conclude that the withdrawal, default, and disqualification rules for the reauction should be based upon the procedures established in our general competitive bidding rules. With regard to bids that are submitted in error, we propose to apply the guidelines that the Commission has fashioned to provide for relief from the bid withdrawal payment requirements under certain circumstances.[190] We seek comment on this approach.

d. *Anti-Collusion Rules*

99. In the *Competitive Bidding Second Report and Order*, we adopted rules to prevent collusion in connection with competitive bidding, explaining that these rules, which are codified at 47 C.F.R. § 1.2105, would enhance the competitiveness of both the auction process and the post-auction market structure.[191] We propose to apply these same

---

[190] *See* Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions, *Order*, FCC 96-203 (May 3, 1996), and Georgia Independent PCS Corporation Request to Waive Bid Withdrawal Payment Provision, *Order*, DA 96-706 (May 6, 1996). *See also* Atlanta Trunking Associates, Inc. and MAP Wireless, L.L.C., Petition for Reconsideration of Bid Withdrawal Payment and Georgia Independent PCS Corp., Application for Review of Request to Waive Bid Withdrawal Payment Provision, *Memorandum Opinion and Order*, 12 FCC Rcd 6382 (1997) (waiving the full bid withdrawal payments assessed against these parties after a finding that the Commission's remote bidding system may have contributed to some confusion leading to the submission of the erroneous bids).

[191] *See* 47 C.F.R. § 1.2105(c). *See also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386-88; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7245, 7253-7254 (1994); *Erratum*, Mimeo No. 50278, 1994 WL 575828 (October 19, 1994).

rules to the reauction of licenses surrendered to the Commission. We seek comment on this proposal.

e. *Designated Entity Provisions*

100. We propose to provide small business bidders in the C block reauction with a two tiered bidding credit, which will provide a greater discount to very small businesses. In the C block auction, a winning bidder that qualified as a small business or a consortium of small businesses was able to use a bidding credit equal to 25% of its winning bid.[192] For the reauction, however, we tentatively conclude that we should offer tiered bidding credits, as we did for F block and, more recently, Local Multipoint Distribution Service (LMDS) small business bidders.[193] We propose to define a seconds tier of small business, which we will refer to as "very small businesses," as entities that, together with their affiliates and persons or entities that hold interest in such entities and their affiliates, have average gross revenues of not more that $15 million for the preceding three years. Creation of this subcategory of small business enables us to tailor a bidding credit to meet the needs of entities that may be interested in bidding on spectrum surrendered by C block licensees. Thus, we propose a 35% bidding credit for very small businesses and a 25% bidding credit for small businesses. We seek comment on our proposals and tentative conclusions.

101. We also tentatively conclude that an installment

---

[192] 47 C.F.R. § 24.712(a).

[193] *See* 47 C.F.R. §§ 24.717, 101.1107.

payment program will not be offered in the reauction.[194] We have conducted several auctions without installment payments. The Commission must balance competing objectives in Section 309(j) that require, *inter alia*, that it promote the development and rapid deployment of new spectrum-based services and ensure that designated entities are given the opportunity to participate in the provision of such services.[195] In assessing the public interest, we must try to ensure that all the objectives of Section 309(j) are considered. We have found, for example, that obligating licensees to pay for their licenses as a condition of receipt ensures greater financial accountability from applicants.[196] Thus, we tentatively conclude that we should not

---

[194] Section 309(j)(4) of the Communications Act states that the Commission shall, in prescribing regulations pursuant to these objectives and others, "*consider* alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B) . . . ." *See* 47 U.S.C. § 309(j)(4)(A) (*emphasis added*). *See also* Omnibus Budget Reconciliation Act of 1993, Report of the Committee on the Budget, House of Representatives, to Accompany H.R. 2264, A Bill to Provide for Reconciliation Pursuant to Section 7 of the Concurrent Resolution of the Budget for Fiscal Year 1994, May 25, 1993, at p. 255:

> While it is clear that, in many instances, the objectives of section 309(j) will be best served by a traditional, "cash-on-the-barrelhead" auction, it is important that the Commission employ different methodologies as appropriate. Under this subsection, the Commission has the flexibility to utilize any combination of techniques that would serve the public interest. H.R. Rep. No. 103-111 at 255 (1993).

[195] *See* 47 U.S.C. §§ 309(j)(3) and (4).

[196] *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93- 144, *Memorandum Opinion and Order on Reconsideration*, FCC 97-224, 62 Fed. Reg. 41225 (rel. July 10, 1997) ("800 MHz MO&O") at p 130.

extend installment payments to winners in the reauction, given the incentives to entrepreneurs established through the various proposals discussed above. We seek comment on these tentative conclusions.

VI. CONCLUSION

102. In this *Second Report and Order*, we order resumption of installment payments for the broadband PCS C and F blocks, with the payment deadline reinstated as of March 31, 1998. We also adopt options designed to assist C block licensees that are experiencing financial difficulties to build systems that will promote competition, or to surrender spectrum to the Commission for reauction. These options include disaggregation, amnesty, and prepayment. These provisions will create opportunities for C block licensees to provide service to the public while maintaining the fairness and integrity of our auctions program. We also adopt a *Further Notice of Proposed Rule Making* seeking comment on proposed changes to our C block rules to govern the reauction of surrendered spectrum in the C block.

VII. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Regulatory Flexibility Analysis

103. The Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix C. The Initial Regulatory Flexibility Analysis is contained in Appendix D.

B. Paperwork Reduction Act Analysis

104. This *Second Report and Order* contains a modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Second Report and Order*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due December 1, 1997. OMB comments are due December 1, 1997. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

105. This *Further Notice of Proposed Rule Making* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Further Notice of Proposed Rule Making*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Further Notice of Proposed Rule Making*; OMB comments are due 60 days from date of publication of this *Further Notice of Proposed Rule Making* in the *Federal Register*. Comments should address: (a) whether the proposed collection of

information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

C. Paperwork Reduction Act Comment Filing Procedures

106. Written comments by the public on the modified information collections in this *Second Report and Order* are due on or before December 1, 1997. Written comments must be submitted by OMB on the modified information collections on or before December 1, 1997. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

107. Written comments by the public on the modified information collections in this *Further Notice of Proposed Rule Making* are due November 13, 1997. Written comments must be submitted by OMB on the modified information collections on or before 60 days after date of publication in the *Federal Register*. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street,

N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

D. Ordering Clauses

108. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), this *Second Report and Order and Further Notice of Proposed Rule Making* is hereby ADOPTED, and Sections 1.2110 and 24.709 of the Commission's rules are amended as set forth in Appendix B, effective 60 days after publication in the *Federal Register*. The information collection contained in these rules becomes effective 60 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

109. IT IS FURTHER ORDERED THAT the Wireless Telecommunications Bureau's *Suspension Order* dated March 31, 1997, suspending the installment payment obligations for Personal Communications Services (PCS) C block licensees, and the subsequent Public Notice dated April 28, 1997, suspending those obligations for PCS F block licensees are rescinded, effective March 31, 1998, and installment payments for C and F block PCS licensees are reinstated as of that date.

110. IT IS FURTHER ORDERED THAT on or before January 15, 1998, the Election Date, all C block broadband PCS licensees must elect either (1) to continue making payments under their original C block Notes, or (2) one of the options set forth in Section IV of this *Second Report and Order*. The Election Notice must be filed on or before January

15, 1998 with the Office of the Secretary, Federal Communications Commission, Washington, DC 20554 (Attn: Wireless Telecommunications Bureau, Auctions and Industry Analysis Division -- Election Notice).

111. IT IS FURTHER ORDERED THAT the Secretary shall send a copy of this *Second Report and Order and Further Notice of Proposed Rule Making*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

112. IT IS FURTHER ORDERED THAT, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. § 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein.

E. Ex Parte Presentations

113. The *Further Notice of Proposed Rule Making* is a permit but disclose notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

F. Comments

114. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **November 13, 1997**, and reply comments on or before **November 24,**

1997. In addition, a courtesy copy should be delivered to Mark Bollinger, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 2025 M Street, Room 5202, Washington, DC 20554. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus ten copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

G. Additional Information

115. For further information concerning the *Second Report and Order*, contact Jerome Fowlkes or Sandra Danner, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554, (202) 418-0660. For further information concerning the *Further Notice of Proposed Rule Making*, contact Mark Bollinger, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554, (202) 418-0660.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A
List of Commenters

Initial Comments

1. Airadigm Communications, Inc. (Airadigm)
2. ALLTEL Communications, Inc. (ALLTEL)
3. Alpine PCS, Inc. (Alpine)
4. AmeriCall International, L.L.C. (AmeriCall)
5. Bay Springs Telephone Company, Inc. (Bay Springs)
6. Bear Stearns
7. BellSouth Corporation
8. BIA Capital Corporation (BIA Capital)
9. Brookings Municipal Utilities (BMU)
10. Central Wireless Partnership (CWP)
11. Chase Telecommunications, Inc. (Chase)
12. ClearComm, L.P.
13. Comcast Corporation
14. Community Service Communications, Inc. (CSCI)
15. ComScape Telecommunications of Charleston License, Inc. (ComScape)
16. Conestoga Wireless Company (Conestoga)
17. CONXUS Communications, Inc. (CONXUS)
18. Cook Inlet Region, Inc., Cook Inlet Western Wireless, PV/SS PCS, L.P., Western Wireless Corporation, AirGate Wireless, L.L.C., Aerial Communications, Inc., TeleCorp, Inc., and Airadigm Communications, Inc. (collectively, CIRI)
19. Creative Airtime Services, L.L.C. (Creative)
20. Cyber Sites, L.L.C.
21. Dewey Ballantine
22. DiGiPH PCS, Inc. (DiGiPH)
23. Duluth PCS, Inc., St. Joseph PCS, Inc., and West Virginia PCS, Inc. (collectively, Duluth PCS)
24. Eldorado Communications, L.L.C. (Eldorado)

25. Fortunet Communications, L.P. (Fortunet)
26. General Wireless Inc. (GWI)
27. Holland Wireless, L.L.C., Wireless 2000, Inc., and Northern Michigan PCS Consortium, (collectively, Holland)
28. Horizon Personal Communications, Inc. (Horizon)
29. Indus, Inc.
30. Integrated Communications Group (Integrated)
31. Kansas Personal Communications Services, Ltd. (KPCS)
32. Ken W. Bray
33. Magnacom Wireless, L.L.C., PCSouth, Inc., and Communications Venture PCS Limited Partnership (collectively, Magnacom)
34. MCI Communications Corporation (MCI)
35. Meretel Communications Limited Partnership (Meretel)
36. MFRI, Inc.
37. Morris Communications, Inc. (Morris)
38. National Wireless Resellers Association (NWRA)
39. National Association of Black-Owned Broadcasters, Inc. (NABOB)
40. National Association of Black Telecommunications Professionals, Inc. (NABTP)
41. National Telephone Cooperative Association (NTCA)
42. Nextel Communications, Inc. (Nextel)
43. NextWave Telecom, Inc. (NextWave)
44. Northcoast Communications, L.L.C. (Northcoast)
45. Official Committee of Unsecured Creditors of Pocket Communications, Inc. (Pocket Creditors)
46. Omnipoint Corporation
47. OneStop Wireless
48. OnQue Communications, Inc. (OnQue)
49. PCS Plus L.L.C. and McKenzie Telecommunications Group, Inc. (collectively, PCS Plus)
50. Pioneer Telephone Association, Inc. (Pioneer)
51. Pocket Communications, Inc. (Pocket)

52. Point Enterprises, Inc. (Point)
53. R&S PCS, Inc. (R&S)
54. RFW, Inc.
55. Rural Telephone Finance Corporation (RTFC)
56. Small Business Coalition (SBC)
57. SouthEast Telephone Limited Partnership, Ltd. (SouthEast Telephone)
58. Southwestern Bell Mobile Systems (SBMS)
59. Spectrum Watch
60. Sprint Spectrum L.P.
61. Sprint Corporation
62. Tennessee L.P. 121 (Tennessee)
63. Toronto Dominion Bank and Toronto Dominion Securities (collectively, Toronto Dominion)
64. Urban Communicators PCS Limited Partnership (Urban Comm)

Reply Comments

1. Airtel Communications, Inc. (Airtel)
2. ALLTEL
3. Alpine
4. American Mobile Telecommunications Association, Inc. (AMTA)
5. Antigone Communications Limited Partnership and PCS Devco, Inc. (collectively, Antigone/Devco)
6. BellSouth Corporation
7. Carlson Technologies, Inc. (Carlson)
8. Cellexis International, Inc. (Cellexis)
9. ClearComm, L.P.
10. Comcast Corporation
11. Conestoga
12. CONXUS
13. CIRI

14. Duluth PCS
15. Fortunet
16. GWI
17. GTE Service Corporation (GTE)
18. Ken W. Bray
19. MCI
20. Millison Investment Management, Inc. (MIM)
21. Mountain Solutions LTD, Inc. (Mountain Solutions)
22. Nextel
23. NextWave
24. Northcoast
25. Omnipoint Corporation
26. OnQue
27. PCS Wisconsin, LLC
28. PrimeCo Personal Communications, L.P. (PrimeCo)
29. Radiofone PCS, L.L.C. (Radiofone)
30. R&S
31. RTFC
32. Sprint Spectrum L.P.
33. Stan P. Doyle
34. Telecommunications Resellers Association (TRA)
35. UniDial Communications (UniDial)
36. Urban Comm
37. U.S. Airwaves, Inc.
38. Wireless Nation, Inc.

Ex Parte Comments

1. AirGate Wireless, July 18, 1997
2. AirGate Wireless, July 22, 1997
3. AirGate Wireless, September 9, 1997
4. Alpine, September 17, 1997
5. Alpine, September 23, 1997
6. AmeriCall, July 11, 1997

7. AmeriCall, August 5, 1997
8. AmeriCall and Hughes Network Systems, Inc., September 16, 1997
9. AmeriCall, ClearComm, and Chase, September 17, 1997
10. BIA Capital, August 4, 1997
11. Chase, August 11, 1997
12. ClearComm, August 7, 1997
13. Congressman Rick Boucher, July 25, 1997
14. Congressman Richard Burr, August 11, 1997
15. Congressman Thomas Davis, July 30, 1997
16. Congressman John D. Dingell, September 16, 1997
17. Congressman Steny H. Hoyer, August 7, 1997
18. Congresswoman Sue W. Kelly, August 11, 1997
19. Congressman W.J. "Billy" Tauzin, August 13, 1997
20. Congressman W.J. "Billy" Tauzin and Edward J. Markey, September 16, 1997
21. CONXUS, August 27, 1997
22. Cook Inlet Communications, August 5, 1997
23. Cook Inlet Communications, August 15, 1997
24. Cook Inlet Region, Inc., September 23, 1997
25. El Dorado, August 13, 1997
26. GWI, August 4, 1997
27. GWI, August 15, 1997
28. GWI, August 18, 1997
29. Magnacom Wireless, LLC, August 13, 1997
30. MCI, August 14, 1997
31. NextWave, June 23, 1997
32. NextWave, July 29, 1997
33. NextWave, August 5, 1997
34. Nokia, September 15, 1997
35. Nokia, September 16, 1997
36. Northern Michigan PCS Consortium, L.L.C., August 14, 1997
37. Omnipoint Corporation, August 18, 1997

38. Omnipoint Corporation, September 3, 1997
39. Omnipoint Corporation, September 5, 1997
40. Omnipoint Corporation, September 23, 1997
41. R&S, August 11, 1997
42. Senator Christopher S. Bond, July 14, 1997
43. Senator Paul D. Coverdell, September 24, 1997
44. Senator Pete V. Domenici, September 10, 1997
45. Senators James M. Inhofe, Don Nickles, and Conrad Burns, August 7, 1997
46. Senator John McCain, August 19, 1997
47. Senator John McCain, September 18, 1997
48. Senator Daniel Patrick Moynihan, August 4, 1997
49. Triumph Capital, August 7, 1997
50. Triumph Capital, September 23, 1997 ("McCarthy Letter")
51. Urban Comm, August 21, 1997
52. Urban Comm, September 17, 1997
53. U.S. Small Business Administration, September 8, 1997 ("Glover Letter")

APPENDIX B
FINAL RULES

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 - PRACTICE AND PROCEDURE

1. Section 1.2110 is amended by amending paragraph (e)(4)(i) to read as follows.

§ 1.2110 Designated Entities

(a) ****
(b) ****
(c) ****
(d) ****
(e) ***
(4) ***

(i) If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default, except that broadband PCS frequency block C licensees making the March 31, 1998, interest payment pursuant to their elections under the Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees, Second Report and Order, WT Docket No. 97-82 (rel. Oct. 16, 1997), shall be in default if they are more than sixty (60) days delinquent on such payment.

Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 24 - PERSONAL COMMUNICATIONS SERVICES

2. The authority citation for Part 24 continues to read as follows:

AUTHORITY: Secs. 4, 301, 302, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.

3. Section 24.709 is amended by adding paragraph (b)(9) to read as follows.

§
24.709 Eligibility for licenses for frequency Blocks C and F.

(a) ****
(b) ***

(9) Special rule for licensees disaggregating or returning certain spectrum in frequency block C.

(i) In addition to entities qualifying under this section, any entity that was eligible for and participated in the first auction for frequency block C, which began on December 18, 1995, will be eligible to bid in a reauction of licenses for frequency block C conducted after March 31, 1998.

(ii) The following restrictions will apply for any reauction of frequency block C licenses conducted after March 31, 1998:

(A) Applicants that elected to disaggregate 15 MHz of spectrum from any or all of their frequency block C licenses, as provided in subsection IV.B., Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees, Second Report and Order, WT Docket No. 97-82 (rel. Oct. 16, 1997), will not be eligible to apply for

such disaggregated licenses until 2 years from the start of the reauction of those licenses.
(B) Applicants that surrendered any of their frequency block C licenses as provided in subsection IV.D. (the "prepayment option") Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees, Second Report and Order, WT Docket No. 97-82 (rel. Oct. 16, 1997), will not be eligible to apply for the licenses that they surrendered to the Commission until 2 years from the start of the reauction of those licenses.
(C) For purposes of this paragraph, applicant shall mean the applicant and its affiliates and any present or former qualifying member of a control group and their affiliates.

* * * APPENDICES C & D OMITTED * * *

Affirming and Dissenting Separate Statement
of
Chairman Reed E. Hundt

Re: C Block Financing Issues

The C block is the long-desired fifth wireless license: the third so-called PCS license to be added to the two outstanding cellular licenses. A half-dozen holders of the C block licenses for about two-thirds of the country by population are in financial distress and apparently unable to pay monies promised to the government by these licensees in a fair auction of the C block licenses. The question presented today is what should the FCC do as a creditor and a policymaker in this situation. For ten months I have been stating that the key policy goal in wireless is competition, not debt collection. However, it is also true that this Commission, as a creditor, ought to behave in a commercially reasonable manner. In America debtors who cannot pay are not thrown into prison, nor ought they be consigned to a Serbonian bog of Commission deliberation in which armies of lawyers and lobbyists and Commission staff are sunk. Yet for almost a year my colleagues on this Commission have been unwilling to make a commercially reasonable restructuring proposal of any kind to any of the financially troubled C block licensees. Nor have they been willing to promote competition by expediting some solution to the need to restructure and finance the C block.

Having this fifth license used in the marketplace is a longstanding goal of policy in this country; allowing it to be unfinanceable due to moralistic arguments against commercially reasonable structuring of debtridden licensees faced with unsolvable financial problems is inconsistent with all the wireless competition policies of this Commission and

the repeated public statements by all commissioners for many years. Today the Commission, after ten months of inaction in response to my repeated urgings, finally decides to take some significant steps consistent with the reasonable commercial practices of any debt holder and consistent with our oft-stated commitment to competition.

The Commission has a history dating back to 1993 of seeking to promote small business entrepreneurial activity in wireless with these C block licenses. This history included the current Commissioners' decision in 1994 to reallocate the PCS spectrum so as to make sure the C block licenses were of equal viability to the two other 30 MHz PCS licenses auctioned in 1994. Subsequently, the Commission designated the C block as an entrepreneur's block expressly to promote participation by small businesses and businesses owned by minorities and women. After the Supreme Court's *Adarand* decision, that plan had to be revised to eliminate provisions for minorities and women but the Commission retained its primary objective of providing entrepreneurial opportunities for small businesses. All current Commissioners supported this objective.

After the FCC successfully persuaded the Supreme Court to lift an appellate court stay, the C block auction began in 1995. To the dismay of many, some of the winners bid at levels far beyond apparently prudent ranges. Most did not; dozens of financially prudent bidders won at reasonable prices. But a handful of bidders submitted bids that cannot be explained other than by assuming they made their decisions according to erroneous market predictions, bad financial advice or a triumph of hope over thought. Regrettably, these bidders -- irrationally exuberant in hindsight and, according to many, even at the time of bidding -- won nearly three quarters of the United States market measured by population.

Some of these bidders have subsequently criticized the FCC's auction process and other FCC actions. None of this criticism has the slightest basis in fact. All amount to unworthy attempts to shift blame from the bidders to the auction conductor. Nothing about this history discredits auctions as a means of distributing licenses. Moreover, the installment payment and bidding credit plan that facilitated entrepreneurial entry into the C block in fact worked very well with respect to the majority of the licensees. More small business participation in wireless resulted from prudent bids in the C block than in virtually all other FCC license distributions in this decade.

However, the current situation, and indeed the situation for almost a year, has been that a handful of large C block licensees have been unable to attract sufficient financing to create viable businesses. These are at least Nextwave, Pocket, GWI, ChaseTel and ClearComm.

Unfortunately, all other C block bidders have their business futures occluded by the financial troubles of these large, financially troubled bidders. That is because Wall Street financiers are interested in seeing the build out of the entire block with the attendant possibilities for roaming that would be realized by complete buildout. In other words, the financial difficulties of the largest troubled bidders are in fact visited on otherwise financeable C block bidders.

Furthermore, the country's wise policy of encouraging wireless competition is hampered by the financial troubles of the C block. The sooner this block of licenses can be financed, the quicker we will see long overdue robust price and quality competition in wireless.

In addition, our decision not to adopt a single standard, and to permit competition among CDMA, TDMA and GSM, is also undercut by a failure to put the C block on reasonable financial footing. It is simply necessary to have at least three PCS firms operating in major markets to permit each of these technologies a fair chance to gain adherents.

I was aware last December that the market was unlikely to finance many of the largest bidders. That is why, in my year end statement entitled, "The Hard Road Ahead", I stated that "commercial lenders often reassess the terms of loans to address changes in the marketplace" and that C block licenses "perhaps . . . should be able to request renegotiation of their financing where it is necessary and appropriate to do so."

I made this suggestion because it is necessary for creditors, such as the United States in this situation, to act in a commercially reasonable manner. And it is necessary for the Commission to focus persistently on major policy goals and not to make the blunder of thinking that Congress has tasked us to attempt to maximize revenue from the C block auction. Here the goals are, as a matter of statute, not to maximize revenue from the C block, nor to punish debtors for their unwise bids, but rather we are commanded by Congress to promote competition, deployment of service and small business entry.

For the greater part of the last ten months my colleagues and I have disagreed over these objectives. They have focussed instead on questioning whether the largest licensees were really financially troubled, or they have evinced disinterest in the significance to consumers of these licensees' business prospects, or they have dwelled on the disappointment of other C block bidders who dropped out of the bidding in markets where price levels reached the heights now universally seen as

imprudent and unsustainable. Finally, they have expressed indifference to the risk of bankruptcy filings by the subject licensees, rather than negotiating restructuring of their debt according to market-based principles.

With perfect hindsight, had Congress written the law to state with inexorable clarity that the auctioning of wireless licenses does not suddenly make them property subject to bankruptcy jurisdiction, this latter point would be moot. Indeed, if tying up licenses in bankruptcy litigation were foreclosed as an option for a troubled C block licensee, then the Commission could simply retrieve licenses from defaulters, and reauction them to other small businesses. This is why I asked Congress this summer to amend the law to make clear that such action could be taken. No other commissioners joined me at that time. Powerful lobbying forces defeated my efforts. I am glad that, at least in recent days, all commissioners have joined this effort. However, responsible leaders in Congress have assured us that no such legislation is likely this year.

Pocket Communications, one of the largest C block licensees, is already in Chapter 11. An objective of the Commission therefore ought to be to compromise the Pocket litigation, as we have been advised by Sidley & Austin, Gordian Group, and many other experts. I had hoped that today's decision would offer a market-based compromise Pocket would accept. I have doubts that the decision today will accomplish that result.

Another objective ought to be to reach market-based compromises with the other troubled C block licensees that would at least roughly approximate results that could be obtained in bankruptcy settlements -- because that strategy would save the time and money expended trying to retrieve

unused licenses in bankruptcy.

I might be the only FCC commissioner in history who has actually litigated as an attorney for creditors in bankruptcy court. Normally this would be of small relevance to my job. However, from personal experience, as well as from the advice of our experts, I am quite confident that bankruptcy litigation can cause substantial delay even when the creditor's legal position is impregnable. That is the case here. Some debtor's attorneys have suggested that such issues as perfection of UCC-1's are a legal problem for the Commission. This is a frivolous assertion, that underscores the desperate ingenuity of a bankrupt firm's counsel but plays no role in our thinking or actions. Highly skilled outside counsel, Department of Justice lawyers, our own General Counsel's office, and my own personal experience all convince me beyond any doubt that we will prevail in bankruptcy court. But the process of bankruptcy litigation takes time and money. Meanwhile, the assets in question are, based on all advice, declining in value while lawyers talk and commissioners deliberate and lobbyists advocate. The reason is the lead time granted to the other licensees. If we truly want small business entrepreneurs to make use of the C block spectrum, we simply have to permit them to restructure their government debt or obtain the debtor's voluntary agreement to return the licenses quickly for prompt reauction. This is why it is so important for the Commission to make proposals that might obtain such agreement at least from some of the C block licensees. This action is overdue, and although the Commission may not have made a perfect decision today, some decision was better than none.

The test of any work-out plan for the financially-troubled C block licensees appears to be this: Does the plan avoid protracted bankruptcy, with the attendant costs of debtor and

creditor litigation, while also generally treating fairly the competing interests of the taxpayers, consumers, non-government creditors, equity holders and other interested parties?

Today we adopt at least one plan that is highly likely to obtain a voluntary and fair restructuring settlement agreement from several of the troubled bidders. I refer to the disaggregation plan, which allows licensees to return 15 Mhz of spectrum in return for a proportionate reduction in the amount of their outstanding debt. This will help small or rural area licensees who may not need the full 30 Mhz of spectrum to serve their markets. If long delayed, at least we are at last adopting this change in our rules.

The so called "amnesty" option we adopt today is also a good idea and I would have been happy to extend it to any licensee at any time. The problem of course is that it does not provide any incentives to the licensees' non- government creditors to consent to a return of licenses and therefore is not a workable solution. Congressman Dingell has told us that in his view "Giving licensees a choice between walking away from investments already made and facilities already constructed, or taking a chance in bankruptcy court, is tantamount to giving them no choice whatsoever." Nonetheless, I don't object to our decision to offer this as an option.

Another plan we considered including in our Order today had real promise for practical use -- the so-called "full price buy out plan." This plan, proposed originally by the bipartisan leadership coalition of Congressmen Markey and Tauzin, would have permitted a licensee to retain as many of its licenses as it could pay for in cash today (at net present value)

using the full amount of funds on deposit plus any additional sums it could immediately raise. Licenses that could not be paid for in this manner would be returned and reauctioned in exchange for discharge of the debt obligations associated with these licenses.

Unfortunately, the prepayment plan included in today's Order fails by a number of key measures to be consistent with the Markey/Tauzin suggestion and with good policy. I register my strong dissent as to this part of the Order.

First, it is questionable why a majority of Commissioners departs from the bipartisan consensus in Congress on this issue. Just two weeks ago, Senator Domenici wrote the Commission urging that we adopt a "comprehensive solution . . . [that would] put into productive use the spectrum." He also advised against pursuing "options that forestall the commercial application of Block C spectrum because of time-consuming and costly litigation resulting . . . from extended bankruptcy proceedings." This sentiment is also reflected in letters from Senator McCain received over the past six weeks. Likewise, Senators Inhofe, Nickles and Burns expressed their view in early August that "debt restructuring of the PCS licensees may be necessary to address the concerns that have been raised by the interested parties." Congressmen Markey, Tauzin and Dingell have each supported the full price buy out plan described above.

This correspondence makes plain Congress' direction that we adopt a workable, comprehensive plan for the C block. That is consistent with the statute. The Congressional mandate has not been adequately met by the Order we adopt today.

The Order requires licensees to forfeit 30% of their

deposits if they elect the "buy-out" option, even though this money has already been paid and would be used to purchase licenses at the price bid in the original C Block auction. That penalty is more than 50 times higher than any previous penalty in FCC history. The bipartisan view from Congress is that no such forfeiture should be imposed -- a difference which potentially represents hundreds of millions of dollars lost by incumbent licensees for reasons that bear no relation to the policy goals included in Section 309(j) of the Communications Act which granted the Commission's original auction authority. Today's Order also ignores the bipartisan conclusion of Congress that prepayment prices should be set based on "the net present value of the . . . prices for such licenses." Instead, the prepayment alternative ignores the time value of money and extracts an additional penalty from licensees on the order of several hundred million more dollars.

Second, the prepayment option we adopt today stands fundamentally at odds with basic principles of commercial reasonableness. By requiring licensees that elect the option to prepay their licenses at the "nominal" bid price, the plan ignores the time value of money and inflates the effective price paid by the licensees that it purportedly seeks to assist. Put simply, the value of a bid paid out over ten years is significantly less -- around 40% less -- than that same bid paid in cash. The consequence of this oversight is a massive penalty for any licensee that might otherwise elect this alternative. The prepayment option layers on an additional penalty by requiring licensees to forfeit 30% of their deposit. Note that this forfeiture of deposited monies is ordered even though the licensees would use their deposits to prepay licenses at effective prices higher than the amount that they bid. At base, the plan ignores fundamental principles of finance and, as a result, cannot reasonably be expected to appeal to licensees or

their creditors.

Third, the prepayment plan adopted today has too much risk of not being helpful to the financing of the licenses held by the very large bidders that constitute the vast majority of the C block licensed POPs in the United States. The acid test of any work out plan is whether the deal is accepted by the debtor; if not, the plan is not a work-out but rather only works us deeper into the toils of a drawn out bankruptcy litigation. In this case, the prepayment plan extracts the two extraordinary penalties described above and offers little in the way of incentives for licensees to accept it. According to the Congressional Budget Office Report, bankruptcies could cost consumers in excess of $5.5 in lost benefits. Taxpayers lose because the re-auction of licenses is conducted in a piecemeal fashion at the end of lengthy bankruptcy litigations, ensuring smaller proceeds as the value of the licenses deteriorates from delay. Such are the costs of the Commission majority's sanctimonious rigidity.

The majority's unwillingness to adopt a comprehensive plan for addressing the financial situation of the C block is inexcusable and inexplicable. The legacy of that decision is a substantial risk of bankruptcies that Congress and any commercially reasonable enterprise would have us eliminate. By focussing on punishment and ignoring the need to make the work-out "workable", the majority sacrifices consumer and taxpayer interests. This approach is fundamentally misdirected and contrary to our statutory directives. In short, today's decision will delay more competition for most Americans. Competition delayed is competition denied.

Finally, it is not clear to me that the parameters of our Order today and the accompanying Notice treat fairly those C block companies -- such as Omnipoint, Cook Inlet and

Airadigm -- that have accepted our challenge to bring service to market and who, as result, have invested heavily in build out. These licensees have operating businesses that are tied to specific C block licenses. Consequently, they do not have the same flexibility as other licensees to disaggregate or participate in a "full price buy out," which would require a dramatic reduction in the size of their existing service footprints. This concern with fairness is more than a metaphysics. These licensees must complete for capital in the public markets with other C block licensees, including winners of the subsequent re-auction. To the extent that such a re-auction of spectrum returned under any of the options in our Order today "resets" the market price for spectrum, it could impair access to capital for those licenses that are significantly built out but which carry artificially higher prices per pop.

The concerns I have identified do not subtract from the following facts:

1. After many months of discussion the Commission has finally recognized the need to restructure certain debt in the C block.

2. Today's decision will permit us to obtain some licenses for reauction and will permit some licensees to get financing, based on all available information.

3. And we have, at the very least, not simply extended the payment dates on the existing notes by the many years sought by some licensees. This proposal was unfair to the taxpayer and an unnecessary windfall to most C block licensees.

Therefore, I affirm in part and dissent with respect to the so-called "full price buy-out" plan.

Separate Statement
of
Commissioner Susan Ness

Re: Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82

A little over a year ago, we conducted an auction for the "C-block" PCS licenses. Like our other auctions, this auction was carefully conceived to operate on market-based principles, allowing licenses to be obtained by those who valued them most at prices to be set by free market mechanisms. It was also crafted to fulfill a Congressional mandate to bring "designated entities" -- especially small businesses, often owned by women and minorities -- into the marketplace. And it did.

I supported our commitment to market-driven auctions and to designated entities. I reaffirm that commitment today.

Our auction was conducted properly, our rules were clear, and numerous licensees stand ready to meet their payment obligations fully and on time. And while it is truly unfortunate that a handful of bidders overbid and/or overleveraged, it is clearly not our responsibility to prevent them from failing in the marketplace, or from going into bankruptcy. It is our responsibility to manage the spectrum, including the auction process, with *fairness and integrity*.

Although I sincerely regret that some licensees now find themselves unable to meet their commitments, I remain unpersuaded that the FCC should alter the outcome of the auction by providing bidders vastly more favorable terms than

those to which they previously agreed. To grant overly generous accommodations to certain C-block licensees, after the auction, would be to forsake the marketplace and return to the government picking winners and losers. I do not think that this should be our spectrum policy for the future.

Such a result also would be unfair to those C-block licensees that counted on us to enforce our rules; unfair to disappointed C-block bidders who dropped out of the auction when the licenses they desired became too expensive; unfair to licensees in other spectrum blocks who are offering competing services; and unfair to the U.S. taxpayer.

I do support, however, modest options that would facilitate the return of spectrum and reauction in a timely and fair manner. The menu of options we offer to all C-block licensees today provides an appropriate balance.

Clear Rules; A Fair Auction

Everyone participating in the C-block auction was subject to the same rules. The auction was run fairly. Even now there are no serious complaints about our conduct of the auction or the clarity of our rules.

Our rules were designed, as Congress intended, to create opportunities for small businesses. Eligibility to bid was limited, and favorable payment terms were available. While we offered licensees the opportunity to pay for the licenses in installments, we were not a lender in the traditional sense: the payment terms were available to all small businesses without regard to their credit-worthiness or soundness of their business plans. First and foremost, we acted as a licensing agency and, as our rules clearly specified, the licenses were granted

conditionally.

Each license was conditioned upon timely payments according to a predetermined payment schedule, with the caveat that the license would automatically cancel if the payments were not made. The conditional interest granted is clearly noted on the face of the license itself, and in the relevant Commission rules and orders. (Indeed, the conditional nature of the license and the attendant penalties and loss of downpayment are duly acknowledged in at least one large bidder's public filings with the Securities and Exchange Commission.)

The Problem

The C-block auction resulted in licenses being won by a handful of large players -- each with license bids in excess of a billion dollars -- and a multitude of smaller players. Several of the largest winners paid well in excess of prices comparable to those paid by the A and B block licensees. Compounding the problem, some of these same large players have highly leveraged capital structures with debt/equity ratios as high as 10 - 1, tying their future to conducting a successful public offering. In contrast to the larger players, the majority of the C-block winners have smaller holdings, paid considerably less per pop for their licenses and/or had more prudent capitalization. For the most part, the smaller licensees do not appear to be in financial trouble.

Last spring, a handful of the largest winners requested relief from their obligations -- essentially to keep their licenses on more favorable terms than those they voluntarily agreed to just sixteen months ago. They were outnumbered by many smaller licensees who have not sought relief and who are ready to build out their markets.

Nonetheless, as the campaign for significant modifications won some support at the Commission, other licensees echoed the call, reflecting a natural desire to pay less should the Commission be willing to rewrite the terms of the agreement. The chorus transcended the C-block and has now spilled over into other radio services. Interest payments were temporarily suspended as of March 31, 1997, pending Commission consideration of what, if any, measures should be taken to assist financially troubled licensees.

Other interested parties include many small companies -- some of which failed to win any licenses and dissolved -- who feel the prices were unreasonably driven up by certain bidders during the auction. Many of the investors in these companies and in those C-block licensees currently meeting their obligations believe fairness dictates that defaulting parties forego their licenses, that the licenses be reauctioned, and that everyone have a fair chance to acquire the licenses in a subsequent auction.

Marketplace Disruption

We must, however, consider certain countervailing factors. The financial markets became unsettled subsequent to our suspension of C-block installment payments. Licensees with sound business plans have been enveloped by the cloud of marketplace uncertainty, and the flow of capital needed for continued build- out has been impeded. C-block licensees, to varying degrees, have plans on hold, as the financial community awaits the outcome of this proceeding.

The Commission must take action now to get the C-block of licensees back to business. While there has been a wide range

of proposals offered and considered, the one thing that almost all parties have agreed upon is that final resolution is needed immediately to enable rapid build-out and foster competition.

A Menu of Options

We adopt a menu of options that is likely to help many of the troubled licensees, without jeopardizing the principles of fairness and integrity that are essential to market-driven auctions. In developing these options, the majority of Commissioners have discarded proposals that would have fundamentally changed auction outcomes or created incentives for licensees to alter otherwise achievable business plans. In addition, we have avoided giving anyone a "thumb on the scales" in a subsequent auction.

Specifically, we are continuing the deferral of installment payments until March 31, 1998, making the total suspension period a full year. This resumption date ensures that all C-block licensees and prospective financial backers will have sufficient time to complete their deals. Some will also benefit from the access to foreign equity that is permitted, beginning January 1, 1998, under the recent WTO Agreement. (This is all the relief that was initially sought by one bidder that is now urging us to adopt a very substantial restructuring.)

All C-block licensees who do not choose one of the three following options will be expected to resume payments under their existing agreements. I hope and anticipate that the vast majority of successful bidders will proceed in this fashion.

The three options are:

First, under the amnesty option, licensees may forfeit *all* of

their licenses and their downpayments. In return, the Commission will (in coordination with the Department of Justice) approve forgiveness of their outstanding debt and cancellation of the additional penalties, including a deficiency payment (representing the difference between the net bid price and the price obtained in a subsequent auction), that otherwise would be due. The licenses will then be reauctioned.

Second, under the disaggregation option, licensees may return half of their spectrum in a given market or markets in exchange for a corresponding reduction of debt. This is consistent with our existing disaggregation rules, facilitates new spectrum-based competition in the marketplace, and better enables the cash flows of the licensees to service the significantly reduced debt. We will re-auction licenses for the 15-megahertz spectrum blocks that are returned under the same designated entity terms as apply to all other C- block licenses. Several of the largest licensees have endorsed this option.

Third, under the prepayment option, licensees may apply 70 percent of their downpayments from licenses they now choose to abandon and 100 percent of their downpayments for licenses they now choose to keep to pay for as many licenses at the original auction price as they can afford. This is a buy-out, not a bail-out. Again, returned spectrum will be re-auctioned under the same terms as apply to all other C-block licenses.

Rejected Options

We carefully considered and discarded other options. For example, our dissenting colleague would have offered vastly more generous buy-out options. His actions suggest that the prospect of a large licensee filing for bankruptcy must be avoided at all costs. I cannot agree.

Substantial Discounts: Under the approach advocated by the Chairman, the debt owed by the licensees would be drastically discounted -- a 40% haircut to the American taxpayer -- well below the prices that other, subsequently disappointed, bidders were clearly willing to pay. This would be replacing a market-based outcome with an FCC-directed outcome. I agree with the Chairman's prior statements that the market -- not the FCC -- should pick the winners and losers.

In my view, the price bid is the price bid. Bidders were not offered a cash versus credit price. The notes do not provide for prepayment discounts. If the FCC wanted to induce licensees to prepay, we would have included a prepayment schedule in our notes and rules. To the contrary, the favorable financing terms offered -- at an interest rate reflecting the cost of capital to the U.S. government -- were designed, in part, to induce designated entities to hold their licenses for a full ten years. This was consistent with Congress's stated goals to bring small business, including women and minorities, into the market -- on a sustained basis. Therefore a licensee would be unjustly enriched if it received the full ten year benefit of attractive financing without the burden of holding the license for the full term.

Use of All Downpayments: I also disagree with the Chairman that the C-block licensees should be permitted to "spend" 100 percent of their deposits from licenses they no longer want, to pay for licenses they *do* want. These funds have been paid to the U.S. Treasury and are not the licensees' to redeploy as they wish. That policy was clearly stated in our rules and documentation. Indeed, the Chairman reiterated that view in an April 30, 1997, speech to the Federal Communications Bar Association:

> Some say that the C-block licensees will not pay the total of their commitments to installment payments. If that is true, they will not hold the licenses any longer. But still the taxpayers will have received all the installment payments to that date, and we will reauction the licenses...

A buyer of an option to purchase a piece of property is not entitled to apply the price of that option to the purchase price of another property. If licensees were able to use 100 percent of their deposits to cherry-pick which licenses they want to keep and which they want to return, they would recoup in full what they paid and there would be no deterrent in future auctions against bidding excessively. Such a result surely would poison a market-based auction.

Moreover, we have repeatedly refused to allow defaulting licensees to recoup their downpayment -- not just in the C-block auction, but in other auctions. Again, the purpose is to ensure the integrity of the auction.

Nonetheless, to accommodate some of the troubled licensees, the majority has agreed to allow them to apply up to 70 percent of the downpayments on licenses returned and 100 percent of the downpayment on licenses kept toward payment for selected licenses. The remaining 30 percent of the downpayment on returned licenses equates to the 3% of bid price default penalty specified in our rules.

The Wireless Telecommunications Bureau has routinely assessed such penalties, including loss of downpayment, on

defaulting bidders.[1] It also have assessed similar penalties against defaulting auction winners in other spectrum bands. While the amount at stake for the largest C-block licensees is not insignificant, surely it cannot be the policy of the FCC that we grant generous breaks to the largest bidders while we strictly apply our rules -- including the penalty provisions -- to the smaller bidders.

Transferable Bidding Credit: Finally, the Chairman would have allowed licensees to return all licenses and then apply 100% of their downpayments as a transferable bidding credit in a subsequent auction. This option, too, was carefully considered and discarded as being grossly unfair to losing C-block bidders, and to those bidders who already have built out their systems and cannot risk returning their licenses. It would have put a "thumb on the scales" in the subsequent auction in favor of the defaulting bidders. Those who bid up the original auction would now be rewarded by receiving full use of their downpayments toward the same licenses, at presumably significantly lower prices with "use it or lose it" dollars, or to cash out through another bidder. No wonder this concept found few policy adherents.

Other Misconceptions

Declining value of the licenses: Clearly, it would be better if C-block licensees did not file for bankruptcy. As a former

[1] For example, in May, one C-block bidder, BDPCS, Inc., was assessed a $67.7 million penalty, which totals 7% of the face amount of its bids of approximately $873 million. *See* BDPCS, Inc., Order, 12 FCC Rcd 6606 (WTB, 1997). Another C-block bidder, C.H. PCS, was assessed an initial penalty for over $6.4 million. C.H. PCS Inc., Order, 11 FCC Rcd 22430 (WTB, 1996).

communications lender, I am painfully aware of the problems and timeframes associated with bankruptcy proceedings. Nonetheless, I do not share the view that the C-block spectrum is a declining value asset, or that if the licenses were tied up in protracted litigation, they would ultimately yield a small fraction of today's worth. Our PCS service rules are extremely flexible, allowing licensees to provide both fixed and mobile services. With changing technology constantly creating new services, there is every likelihood that demand for this spectrum will be there whenever the licenses are reauctioned.

Forestalled Competition: Nor do I believe that C-block licensees must build their systems now or consumers will suffer from lack of competition in mobile communications. Even if buildout of a substantial portion of the C-block licenses were delayed, consumers still have the benefit of competition from the A and B blocks, wide area SMR, and the PCS D, E, and F blocks, in addition to the two cellular licenses in each market. Consumers in many markets already enjoy a substantial reduction in rates as a result of PCS competition.[2] Moreover, licensees are obligated to have built their systems only by the fifth year. Thus even if bankruptcy were avoided, there is no guarantee that service would commence immediately.

I reject the argument that if we do not provide extraordinary relief to the largest C-block licensees, other C-block licensees will be stymied by lack of roaming opportunities for their

[2] The Yankee Group identifies over 40 markets that now have three wireless competitors and 10 markets with four competitors. It observes that pricing in competitive markets with at least one new PCS operator averages 18% lower than in markets with no PCS competitors. *Yankee Watch Mobile Flash -- Competition Begins to Have an Impact on Wireless Pricing (April 18, 1997).*

customers. The marketplace recognizes the problem, and has been working on a solution. Equipment manufacturers are helping to forge agreements that will enable the PCS equipment to roam nationwide, and new handsets operate on both cellular and PCS frequencies. I am confident that wireless telephone competition will not come to a grinding halt if there were a delay in the buildout of some of these licenses.

Conclusion

The FCC's primary responsibilities are to write fair rules, run fair auctions, and issue licenses to successful bidders. We have an obligation of fairness and impartiality to those who bid but chose not to overbid or overleverage. And we owe it to the C-block licensees who seek no special treatment but just want to get about their business to avoid changing the rules in any fundamental way that is detrimental to their business plans.

I believe the approach we adopt today fairly balances the competing interests. Restoring regulatory certainty to the marketplace promotes investment, competition, and service to the American public. Even though the approach we adopt today is the product of negotiation and compromise, and does not reflect the first-choice preferences of any individual Commissioner, I am satisfied that under present circumstances adoption of this order is the course of action that best serves the public interest.

SEPARATE STATEMENT OF COMMISSIONER RACHELLE B. CHONG

Re: Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees, WT Docket No. 97-82, Second Report and Order and Further Notice of Proposed Rulemaking

Introduction

Three years ago, we set up a series of new rules for the conduct of a historic auction, the first U.S. auction of spectrum for the purpose of providing Personal Communications Service (PCS). Our previous assignment methods of lotteries and comparative hearings were time-consuming, resource-intensive, and encouraged losing applicants to tie up the licenses in years of litigation. We believed that auctions would speed the development and deployment of new services to the public; encourage the efficient use of spectrum; and generally award licenses to those parties who value them most highly and who are thus most likely to introduce service rapidly to the public. Finally, auctions recovered for the public a portion of the value of the spectrum.[1] Thus, we firmly believed that the public interest would be served by having market forces, rather than regulators, decide who should be assigned licenses for the PCS spectrum. We also put our trust in market forces to determine which licensees would succeed and which would fail.

---

[1] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, 9 FCC Rcd. 2348, 2349-50 (1994).

Consistent with our statutory mandate under section 309(j),[2] however, we incorporated in our auction rules some special assistance to "designated entities," including small businesses, minorities, women, and rural telephone companies. After some unexpected delay caused by the release of the Supreme Court's Adarand decision,[3] this assistance was narrowed to apply only to small businesses. Because the main problem small business faced was access to capital,[4] we gave them a number of regulatory advantages to address this problem and to give them opportunities to succeed. These tools included a smaller down payment, installment payments and their own block (C Block) so they would not have to bid against larger, "deep pocket" companies.

Despite these advantages, some C Block licensees have found themselves in financial trouble. These licensees allege that the higher per pop[5] values they paid for their C Block licenses as compared to their counterparts in the A and B Blocks, together with alleged recent downturns in the wireless financial markets, have made it difficult for them to obtain financing. A number of C Block licensees have petitioned this Commission asking for relief. They have made impassioned pleas for very dramatic restructuring of their installment payment plans. Some have gone so far as to claim that if we do not restructure their debt, they will go into bankruptcy, pointing to one large C Block licensee who has already gone into bankruptcy.

---

[2] 47 U.S.C. § 309(j).

[3] *Adarand v. Pena*, 515 U.S. 200 (1995).

[4] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd. 5532 (1994).

[5] "Pop" is defined as prices per MHz per population.

Since the beginning of this debate, my initial reaction to these requests for relief was to turn them down. No one disputes that our rules at the time of the auction were clear. Every applicant knew exactly what would happen if a licensee failed to pay in a timely manner. In our rules and in the notes signed by the C block licensees, the Commission could not have been clearer that we granted these licenses subject to conditions. If a licensee failed to meet a condition, including making a timely installment payment, it would be in default; in such an event, the license would be returned to the Commission.[6]

Major Restructuring Requests

Regardless of these clear rules and executed financial agreements, some C Block licensees have asked us for dramatic restructuring, including up to a 70- 80% reduction of their debt or deferrals of all payments for a number of years. I believe it would be unwise for the Commission to agree to any such major restructuring. First, I believe that a major restructuring - or any other dramatic after-the-fact rule change designed to bail out every financially-troubled C Block licensee - harms beyond repair the integrity and credibility of our auction rules. Such a

---

[6] I believe that our licensees reasonably should have expected the Commission to deny requests for relief. Even our dissenting colleague, who thinks that the relief we provide C Block licensees does not go far enough, has publicly stated that if defaults occurred, he would not hesitate to take back the licenses. *See* speech by Chairman Reed Hundt, "To Loop or Not to Loop: Is that the Question?" before the Cellular Telecommunications Industry Association (March 26, 1996) ("But I have heard that some bidders believe that the FCC will forgive the down payment due when the auction is over and even may forgive the principal payments which begin six years later. In the event that anyone knows anyone who thinks such thoughts, I have some advice you can pass on to them: Forget about it.")

major restructuring would make a mockery of our entire auction process.[7] In addition, I believe major restructuring would encourage speculation in any future auctions, because bidders may rely upon anticipated regulatory relief in making bids that are higher than prudence would warrant. Further, any major restructuring might also deter future investment because of the uncertainty caused by our regulatory actions. It is not just the integrity of our auctions rules that is at stake; if we were to permit major restructuring, we would head down a very slippery slope which could have dire consequences for the agency and all of its rules.

Second, I opposed any major restructuring because I felt that it would be inherently unfair to other bidders and licensees, including the following: (1) losing C Block bidders who made prudent bids in accordance with our rules but were outbid by those now in financial trouble; (2) rule-abiding C Block licensees who are promptly making their payments and building out their systems just the way Congress and the Commission wanted them to; and (3) other broadband and narrowband PCS licenses who are competing with the C Block licensees for financial support in the marketplace. These other bidders and licensees have expressed tremendous frustration and downright anger that the Commission would even consider breaching its duty to the American taxpayers and to our other licensees by changing our rules after the fact to give unwarranted relief to financially troubled C block licensees. These licensees are right -- every notion of fair play is violated by a bailout. If we go too far to help the financially troubled C Block licensees, we end up skewing the marketplace and rendering more serious

---

[7] My dissenting colleague states that we have a "sanctimonious" attitude. Far from passing any moral judgments, my decisionmaking is based on the facts, the law, and notions of sound public policy.

harm to others who played by our rules.

The Menu Approach

It has been my consistent position that the wisest thing for us to have done was to decide quickly to enforce our rules. Having said that, some of my colleagues wished to go much farther. In the spirit of compromise and because I felt strongly that we needed to resolve the C Block question as quickly as possible,[8] I initiated the idea of a menu approach and agreed to

---

[8] My dissenting colleague has characterized the majority of the Commissioners as being unwilling to act, or the cause of a ten month delay in reaching a resolution of the C Block issue. I wish to set the record straight. The first C Block request for relief was filed in March 1997, and the draft Public Notice putting out those requests for comment was not presented to the other Commissioners' offices until late May. Reply comments on the petition were due in July 1997, after which time the Staff drafted an item. Thus, given the pleading cycle, no action could have resulted before August. The notion that the Commissioners in the majority are somehow responsible for a ten month delay is ridiculous. Since August, the three Commissioners and our staffs have been deeply engaged in this issue, meeting with dozens of parties, talking with financial analysts and Congress members, reading dozens of *ex parte* filings, and consulting with bankruptcy counsel and the FCC Task Force. In truth, the only delay in this decision was caused by the Chairman, who, for about eight weeks, was wedded to an approach not favored by a single other Commissioner, and who refused to concede defeat. It was he who erected a number of procedural roadblocks in the way of a more timely item. Notably, when a majority of the Commissioners directed the staff in writing to prepare a draft item disfavored by the Chairman, he directed the staff to disregard our instructions, claiming that under Section 5(a) of the Communications Act, he is the "CEO" of the Commission and as such, is the sole person who may "coordinate and organize the work" of the Commission's staff. While Section 5(a) states that the Chairman may coordinate and organize the work of the Commission, he may do so only "in such a manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission." Clearly, the prompt and efficient disposition of the C block

compromise on the ultimate menu that we adopt today in order provide some modest and limited relief for troubled C Block licensees.

The Prepayment Option

Although I support the majority decision, I remain concerned that we may have gone too far, particularly with the prepayment option. I would have preferred not to include this option at all, or if so, to allow the parties to use only 50% of their deposits. Again, due to the need to get the proceeding concluded, and because I felt that the 70% figure was consistent with our rules,[9] I ultimately agreed to the majority's proposal. This proposal was, however, as far as I thought we could prudently go, without endangering the integrity and credibility of our rules.

My dissenting colleague makes clear that he would have preferred to allow the licensees to use 100% of the downpayment and to allow a discount on the net bid price to the net present value. I believe his proposal would have been bad public policy for a variety of reasons. First, I believe that it would have been unfair and commercially unreasonable for us to have discounted the face value of the notes to their net present value. It is clearly fair to other bidders and to the

---

matter was not served by a Chairman who refused to allow the staff to draft a decision supported by a majority of the Commissioners. Having studied the legislative history of Section 5(a), I know that Congress did not intend for Section 5(a) to be a tool of the Chairman to defeat the basic structure of the Commission as a multi- member body, with majority rule and equal votes granted to each Commissioner.

[9] *See* 47 C.F.R. Section 1.2104(g)(2).

integrity and credibility of our rules for the prepayment to be in the amount of the note, i.e. to make the licensees pay what they bid. If we offered an arbitrary discount to net present value, then every C Block licensee -- even those who can pay what they bid -- would demand the same discount. Clearly, the loser would be the American taxpayer, and the culprit the agency that cannot abide by its own rules. Further, to offer deep discounts off the net amount of the debt is outside normal commercial practices. By allowing C Block licensees to pay off their debt in advance of the maturity date, we are allowing them to reap the benefit of not incurring additional interest due on the principal amount owed. To discount the amount of principal owed by C Block licensees would unfairly permit a windfall.

Second, I object to my dissenting colleague's characterization of our decision to allow licensees to use only 70% of their deposits (as opposed to 100%) as an unreasonable imposition of a "penalty." This is no penalty! The prepayment option is simply that -- an option. If a licensee wishes to continue to make installment payments under the terms of its agreement with the Commission, it may do so and all of the monies on deposit with the Commission will go to pay for the purchase of those licenses. Allowing parties to take deposits that were targeted for a specific market's license, aggregate those deposits and use them to buy other licenses for other markets is an enormous benefit that our rule abiding C Block licensees can't enjoy. Under our rules, no such aggregation is allowed; those monies on deposit would have been forfeited to the Commission if the installment payments were not made on each license. Thus, allowing a licensee to use any percentage of deposits for any license they return to the Commission is an enormous benefit; allowing licensees to use 70% of those deposits is downright generous.

Nor do I believe that our failure to adopt the Chairman's prepayment plan makes our C Block approach unworkable. As an initial matter, I do not agree that, as my dissenting colleague asserts, the acid test of our decision is how many licensees avail themselves of the options we set forth here today.[10] At the time we put in place our C Block auction rules, I expected there to be winners and losers. There will be some who may not have prudently bid or who are overcome by subsequent market events; I do not believe it to be the Commission's job to bail out every licensee who finds itself in financial trouble. This notion is inherently inconsistent with an auction and market forces process.

Further, I believe that the more modest relief we have adopted herein does provide some reasonable alternatives for financially troubled C block licensees. I am optimistic that our menu of options will be attractive to a wide range of licensees. Several of the options we presented have been specifically advocated by and supported by commenters.[11] We also have taken steps to make our option attractive to those who have built out their systems.[12] In addition, it appears from recent press reports, that our options may even be attractive to those licensees who are in bankruptcy.[13] A third party has petitioned

---

[10] Indeed, if all parties took an option, it may be evidence that the proposal was too generous.

[11] Clearcomm, L.P., Americall International, L.L.C., and Chase Telecommunications, L.P. *ex parte* letter, September 17, 1997.

[12] Under each of the options, those who have built out have an opportunity to keep the licenses in those markets where they have built out -- subject to certain restrictions designed to prevent "cherry picking."

[13] Although, in general, I am loathe to comment on a pending litigation matter, because this matter was reported in the press and my dissenting colleague raises it in his dissent, I feel I may briefly discuss it here. I am,

the bankruptcy court in the Pocket bankruptcy matter, seeking to purchase Pocket's assets and resume its installment payments.[14] This development generally confirms the wisdom of my initial position that the best thing to do was to simply enforce the rules, and let the market work. In any event, this development supports the majority's belief that the options we have adopted are sufficiently attractive to encourage parties to invest in even the most troubled of C Block licensees.

Bankruptcy Concerns

It may well be, however, that our menu approach does not appeal to every licensee and that some C Block licensees will reject all the options and go into bankruptcy. This is neither a surprise to me nor a development that causes me any serious alarm. In fact, this is a risk I am willing to take. My dissenting colleague's statements to the contrary notwithstanding, it is not the Commission's job to bail out every C Block licensee. Some bidders simply made imprudent business decisions, and despite our desire to assist small businesses in starting wireless businesses, the Commission's C Block auction process only offered opportunities, not guarantees of success. Our job here is to make sure that the public interest is served. The decision we make today strikes the right balance between our responsibility to preserve the integrity and credibility of our rules and our obligation to be fair to all licensees -- including

---

however deeply disappointed that my colleague, an experienced litigator, would see fit to include in his separate statement the advice of our bankruptcy counsel as to our conduct of pending litigation. Moreover, any implication that our counsel's advice supports only the Chairman's position is simply incorrect.

[14] "National Telecom Makes Unsolicited $1.5 Billion Bid For Pocket," Communications Daily, October 3, 1997.

those who are successful and those who find themselves in trouble.

Although I am not indifferent to the sad plight of the financially troubled licensees, or to the delays in service and costs to the Commission associated with a bankruptcy proceeding, I disagree with my dissenting colleague that we should make the threat of bankruptcy the key driver of our decision today. There are three main reasons for my view. First, bankruptcies are a normal activity of our commercial world and, in our role as lender, should be expected. In fact, since, as Commissioner Ness astutely noted, the Commission did not even check applicants' financial status as a traditional lender would have, it truly would have been extraordinary had there been no C Block bankruptcies. The Commission has litigated many a bankruptcy before, and I have full faith in our counsel to obtain the best result possible given our strong case.

Second, despite assertions by my dissenting colleague to the contrary, I do not think the presence of a C Block licensee as the "fifth competitor" in the market is the key to competition in the wireless industry. Even without a C Block licensee in all of the markets, competition in the wireless market will continue to flourish.[15] The combination of four PCS and cellular players, each with more than 25 MHz of spectrum, together with the D, E and F Block licensees, each with 10 MHz, and an enhanced SMR provider makes for a vibrant competitive mix. Nor do I believe that the whole C Block will fail if the largest competitors do not build out their systems immediately. When we declined to adopt a single technology standard for PCS, we left open the possibility that

[15] It is worth noting that our rules do not require PCS licensees to build out their systems in less than 5 years in any case. 47 C.F.R. § 21.930.

there would be situations where parties would have to roam on PCS blocks other than their own. Although a delay in the roll out of service by a third PCS competitor may make roaming agreements a bit more difficult to negotiate, with the recent advancements of dual mode phones, carriers will soon have four wireless systems on which to roam.

Finally, I disagree with my dissenting colleague's characterization of the C Block as "a wasting asset." If there is one thing that I have learned in my years in the dynamic wireless industry, it is foolish to try and predict the future. Spectrum and services once thought to have little value have often proven to be extremely valuable. For example, C Block spectrum -- which some knowledgeable parties thought would sell for significantly less than A and B block spectrum -- far outstripped those values. Although time to market is certainly one factor in determine the value of spectrum, I think the value of the C Block licenses in the future will depend on many factors, including developments in technology and the amount and type of other spectrum available for similar uses.

Conclusion

In sum, I support the majority's decision today with full confidence that we have made a wise and fair decision. I hope that the regulatory certainty that will flow from our menu approach will finally allow the C Block licensees to get back to the business of building out their systems.[16]

[16] It does seem fitting somehow that this Commission, who cut its first teeth on the PCS auction and service rules back in the summer of 1994, finish its term with yet another major PCS decision.

Federal Communications Commission **FCC 97-413**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Part 1 of	)	WT Docket No. 97-82
the Commission's Rules --	)	
Competitive Bidding Procedures	)	
	)	
Allocation of Spectrum Below	)	ET Docket No. 94-32
5 GHz Transferred from	)	
Federal Government Use	)	
	)	
4660-4685 MHz	)	

THIRD REPORT AND ORDER AND SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: December 18, 1997 Released: December 31, 1997

Comments Due: February 6, 1998
Reply Comments Due: February 17, 1998

By the Commission: Commissioners Furchtgott-Roth and Tristani issuing separate statements.

I. INTRODUCTION

1. In this *Third Report and Order*, we make substantive amendments and modifications to our general competitive

bidding rules for all auctionable services. These changes to our general competitive bidding rules are intended to streamline our regulations and eliminate unnecessary rules wherever possible, increase the efficiency of the competitive bidding process, and provide more specific guidance to auction participants. The changes also advance our auction program by reducing the burden on the Commission and the public of conducting service-by-service auction rule makings. In the *Competitive Bidding Second Report and Order* in PP Docket No. 93-253, we stated that we would "issue further Reports and Orders ... to adopt auction rules for each auctionable service or class of service,"[1] and we identified criteria that would govern our choice of service-specific auction rules and procedures, which may be found in Subpart Q of Part 1 of our rules.[2] Since adoption of the *Competitive Bidding Second Report and Order*, the Commission has completed 15 spectrum auction, adopting service-specific competitive bidding rules for each one.[3] Based on the experience we have gained from the completed auctions

---

[1] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2360, p 68 (1994) ("*Competitive Bidding Second Report and Order* "), on recon., Second Memorandum Opinion and Order, 9 FCC Rcd 7245 (1994) ("*Competitive Bidding Second Memorandum Opinion and Order*").

[2] 47 C.F.R. §§ 1.2101 *et seq.*

[3] *See* 47 C.F.R. §§ 24.301-24.320 (narrowband Personal Communications Service (PCS)); 47 C.F.R. §§ 24.701-720 (broadband PCS); 47 C.F.R. §§ 90.901-90.913 (800 and 900 Specialized Mobile Radio (SMR)); 47 C.F.R.§ 95.816 (Interactive Video and Data Service (IVDS)); 47 C.F.R. §§ 100.71- 100.80 (Direct Broadcast Satellite (DBS)); 47 C.F.R. §§ 21.921-21.961 (Multipoint Distribution Service (MDS)); 47 C.F.R. ss 22.960-967 (Cellular Unserved); 47 C.F.R. §§ 25.101-531 (Digital Audio Radio Service (DARS); 47 C.F.R. §§ 27.1-27.325 (Wireless Communications Services (WCS)).

and the comments we have received from commenters,[4] we here adopt general competitive bidding rules to provide for a more consistent and efficient licensing process for all auctionable services.

2. In this Second Further Notice of Proposed Rule Making, we seek comment on additional issues relating to our general competitive bidding rules for all auctionable services, including ways in which the Commission might offer an effective installment payment program in the future. Finally, we seek comment on our proposal to supersede the rules for the auction of General Wireless Communications Services (GWCS) spectrum with the Part 1 rules adopted in this proceeding. We believe that these proposals will assist our efforts to simplify and streamline our regulations in order to increase the overall efficiency of the competitive bidding process.

II. EXECUTIVE SUMMARY

3. This *Third Report and Order* is intended to establish a uniform set of provisions for all auctionable services, which incorporates our experience to date and allows us to conduct

---

[4] The Commission received 24 comments and 19 reply comments in response to Amendment of Part 1 of the Commissions Rules -- Competitive Bidding Proceeding, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making, WT Docket 97-82, 12 FCC Rcd 5686 (1997) ("Notice"). Appendix A contains a list of full and abbreviated names of parties commenting parties. In addition, Appendix A contains a list of parties filing comments, reply comments and ex parte comments in response to a public notice seeking comment in this docket, "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," Public Notice, DA 97-82 (rel. June 2, 1997) ("Installment Payment Public Notice").

future auctions in a more consistent, efficient, and effective manner. More specifically, the *Third Report and Order* modifies and amends Subpart Q of Part 1 of the Commission's rules as follows:

Rules Governing Status as a Designated Entity

- Continues our practice of defining small business size standards on a service-specific basis so that we may take into account the characteristics and capital requirements of specific services in determining what size businesses should be eligible for bidding credits.

- Adopts, for all auctions in which special provisions are made for "designated entities"[5] of a certain business size, uniform definitions of "gross revenues" and "affiliate."

- Eliminates the use of installment payments for the 800 MHz Lower 80 and General Category channels services, and suspends the use of installment payments for other services to be auctioned in the immediate future. Indicates that the Commission intends to eliminate installment payments for the paging and 220 MHz services.

---

[5] *See* 47 C.F.R.§ 1.2110(a). The Commission's rules define designated entities as small businesses, businesses owned by women or members of minority groups, and rural telephone companies. *See also* 47 U.S.C. ss 309(j)(4)(C), (D). After the Supreme Court's decision in Adarand Constructors v. Pena that federal measures awarding preferential treatment on the basis of race are subject to strict scrutiny, the Commission revised its designated entity provisions so that all designated entities must be small businesses. *See* Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995).

- Provides for higher bidding credits, in lieu of installment payments, to encourage and facilitate the participation of designated entities in future auctions. Adopts schedules of bidding credits for which designated entities qualify (although in service-specific rule making proceedings we will continue to establish the appropriate size standards for each auctionable service).

- Modifies the unjust enrichment rule, Section 1.2111(c), which governs the payment of unpaid principal and accrued interest by existing licensees utilizing installment payments who seek to transfer or assign their licenses, to conform with the broadband PCS rules.[6]

Rules Governing Auction Application and Payment Issues

- Amends Sections 1.2105(a) and 1.2107(c) to require that all short-form and long-form applications be filed electronically beginning January 1, 1999, if feasible.[7]

- Amends Section 1.2105(b)(2) to provide a uniform definition of major amendments to FCC Form 175.

- Creates general ownership disclosure requirements to

---

[6] *See* 47 C.F.R. ss 24.716(d), 24.717(c).

[7] Sections 1.2105(a) and 1.2107(c) were erroneously amended by the Order, Memorandum Opinion and Order and Notice of Proposed Rule Making in this docket. The Notice portion of the Order, Memorandum Opinion and Order and Notice of Proposed Rule Making only requested comment on these proposed amendments to the Commission's rules; the Commission did not intend to adopt the rule at that time. *See* Notice at p 46.

eventually allow auction applicants to submit ownership information for one auction that will be stored in a central database and updated as necessary for subsequent auctions, instead of requiring resubmission of ownership information on each short-form and long-form application.

- Affirms our policy of refunding upfront payments before the end of the auction to bidders that lose eligibility to continue in the auction.

- Amends Section 1.2104(g) to apply uniform default rules to all auctionable services and all auction designs.

- Amends Sections 1.2109(a) and 1.2110(e) to permit auction winners who have submitted a timely down payment to submit their final payments on the licenses which they have won 10 business days after the applicable deadline, provided they also pay an appropriate late fee.

- Modifies our rules applicable to licensees currently paying for their licenses in installments to provide for one 90-day non-delinquency period and one automatic 90-day grace period, subsequent to the current 90-day non- delinquency period, and institutes a late payment fee on overdue installment payments, which is similar to that contained in our rules for the broadband PCS F block.

- Clarifies that we will not pursue a policy of cross default, either within or across services, where licenses default on an installment payment.

Rules Governing Competitive Bidding Design, Procedure and Timing Issues

- Clarifies that under its general delegated authority, the Wireless Telecommunications Bureau ("Bureau") may seek comment on specific mechanisms relating to day-to-day auction conduct prior to the start, and during each auction, as required by the Balanced Budget Act of 1997.[8]

- Allows for "real time" bidding in simultaneous multiple-round auctions.

- Amends Section 1.2104, consistent with the Balanced Budget Act of 1997, to provide that the Bureau will seek comment on and specify a minimum opening bid and/or reserve price in future auctions, unless it determines that doing so is not in the public interest.

- Adopts for all auctionable services our broadband PCS rules governing bid withdrawal payments in the event of erroneous bids.

- Retains Section 1.2109(b) in its current form, which governs the Commission's options in the event a winning bidder defaults on its down payment.

- Modifies the attributable investor threshold of the anti-collusion rule, 47 C.F.R.§1.2105(c), to include controlling interests and/or holders of a 10 percent or

[8] Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997), to be codified in relevant part at 47 U.S.C.§ 309(j)(2)(E) and 309(j)(4)(F) ("Balanced Budget Act").

greater interest in the applicant and to permit an entity that has invested in an applicant that withdraws from an auction to invest in other applicants who have applied to bid in the same markets.

- Permits all auction winners to begin construction of their systems, at their own risk, upon issuance of a public notice announcing auction winners.

In this *Second Further Notice of Proposed Rule Making*, we seek comment on a variety of additional proposals relating to our general competitive bidding rules. Specifically, we seek comment on:

- Whether there is a compelling governmental interest that would justify the use of provisions for minority-owned businesses and "exceedingly persuasive justification" for provisions for women-owned businesses.

- Whether there are mechanisms that might further opportunities for rural telephone companies to provide spectrum based services.

- How the Commission might offer an effective installment payment program, while minimizing the concerns (e.g., licensee default or difficulty meeting financial obligations to the Commission) that have persuaded us to suspend the use of installment payments for now, and whether there are other provisions or mechanisms by which the Commission could encourage Section 309(j) designated entity participation in future auctions.

Whether to adopt a controlling interest standard, whether such a standard is sufficient to calculate size so that only those entities truly meriting small business status qualify for bidding credits, whether we should adopt our proposed rule, and whether alternate standards for attributing the gross revenues of investors and affiliates in an applicant would better meet our goals. We also seek comment on whether this proposed standard would be strengthened by imposing a minimum equity requirement (e.g., 15 percent) that any person or entity identified as controlling must hold. Alternatively, we ask whether we should not adopt a minimum equity requirement, but rather indicate only that an absence of equity would raise a question as to whether de facto control exists.

- Whether to supersede the competitive bidding rules previously adopted for GWCS with our Part 1 rules.

III. THIRD REPORT AND ORDER

A. Applicability of General Competitive Bidding Rules

4. *Background*. In the Notice, we proposed to apply the general competitive bidding rules adopted in this proceeding to all future auctions, to the extent possible.[9] In keeping with our goal of simplifying and streamlining the rule making process for all auctionable services, we sought comment on whether the rules adopted in this proceeding should supersede all existing, service-specific competitive bidding rules for future auctions. Specifically, we proposed that these rules would affect all

[9] Notice at p 18.

services that are subject to pending proceedings[10] and any services that have existing competitive bidding rules that might apply to licenses that have not yet been auctioned or that will be reauctioned. In the alternative, we sought comment on whether we should phase-in the applicability of the revised general competitive bidding rules, such that, at a minimum, initial auctions may be completed under the existing service-specific rules while later auctions in the same service would be conducted pursuant to the rules adopted in this proceeding. In addition, we asked whether we should subject licenses that are reauctioned (due to defaults or if no winning bidder is otherwise declared) to these revised Part 1 general competitive bidding rules in the event we decide that these rules will not

[10] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding - Tenth Report and Order, PP Docket No. 93-253, 11 FCC Rcd 19974 (1996) (Interactive Video and Data Service (IVDS)); Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, Second Report and Order and Further Notice of Proposed Rule Making, 12 FCC Rcd 2732 (1997) ("Paging Second Report and Order and Further Notice of Proposed Rule Making") (Paging); Rule Making To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5- 29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services -- Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules, Suite 12 Group Petition for Pioneer Preference, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making (rel. March 13, 1997) ("LMDS Second Report and Order") (Local Multipoint Distribution Service (LMDS)); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Memorandum Opinion and Order on Reconsideration, FCC 97-224 (rel. July 10, 1997) ("800 MHz Memorandum Opinion and Order and Order on Reconsideration"), 11 FCC Rcd 22114 (1996) (800 MHz SMR).

supersede existing service-specific auction rules. Finally, we asked that to the extent commenters believe that service-specific rules should be maintained, they explain which ones and why.

5. *Discussion.* With some exceptions, we adopt our proposal in the Notice to apply the general competitive bidding rules adopted herein to all future auctions, regardless of whether service-specific auction rules have previously been adopted. Our Part 1 rules will apply to all auctionable services, unless we determine that with regard to particular matters the adoption of service- specific rules is warranted. As we indicated in the Notice, we have gained significant experience in the course of the 15 auctions conducted to date. In particular, we have found that much of our auction process can be standardized and that adopting service-specific rules for many aspects of the competitive bidding process is both unnecessary and confusing. We also find that conducting separate rule makings for each individual service often slows the delivery of service to the public because it results in regulatory delays before the licensing process begins. The majority of commenters addressing this issue agree,[11] emphasizing that the adoption of uniform auction procedures will (1) shorten the rule making process for future auctions by narrowing the issues on which the Commission must seek comment in service- specific rule makings;[12] (2) decrease

---

[11] See, e.g., PageNet Comments at 2; CII Comments at 4-5; Airadigm Comments at 2; NTCA Comments at 1-2; AT&T Comments at 1-2; AMTA Comments at 1; Metrocall Comments at 3; NextWave Reply Comments at 2; AICC Reply Comments at 2; ISTA Comments at 3 and Reply Comments at 1.

[12] *See* PageNet Comments at 1-2; AT&T Comments at 1-2; AICC Reply Comments at 2.

uncertainty for auction participants;[13] (3) benefit small businesses because uniform rules are more easily understood and complied with, particularly by those with limited resources and those that participate in different auctions;[14] and (4) enable the Commission to develop a consistent body of law and precedent governing the auction process.[15]

6. The Balanced Budget Act expands the Commission's auction authority.[16] Section 309(j)(2) formerly stated that mutually exclusive applications for initial licenses or construction permits were auctionable if the principal use of the spectrum was for subscription-based services and competitive bidding would promote the expressed objectives. As amended, Section 309(j)(2) provides that, in cases of mutually exclusive applications, all spectrum is auctionable except licenses or construction permits for (1) public safety services; (2) digital television service given to existing broadcasters to replace their analog license; and (3) non-commercial educational or public broadcast stations.[17] In addition, the Balanced Budget Act authorizes the Commission to assign pending broadcast license applications filed before July 1, 1997 by means of competitive bidding pursuant to Section 309(j).[18] Because these legislative

---

[13] *See* PageNet Comments at 1-2.

[14] *See* NTCA Comments at 2.

[15] *See* PageNet Comments at 7-8.

[16] *See* generally, Balanced Budget Act, Title III.

[17] Balanced Budget Act,§ 3002

[18] Balanced Budget Act,§ 3002(a)(3). Comment is currently being sought on the use of the Part 1 rules for the auction of this service. *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Fixed Television Service Licenses, MM Docket No. 97-234, Notice of Proposed Rule

changes significantly increase the number of services that will be licensed by competitive bidding, we believe that adopting uniform competitive bidding rules for all auctionable services is even more necessary.

7. With limited exceptions, the rules we adopt today will not apply to the initial auction of licenses in the paging, 220 MHz, and Local Multipoint Distribution ("LMDS") services. The Commission previously adopted service- specific auction rules for the auction of these services.[19] We believe that this decision is in the best interest of prospective applicants for these auctions, who may have relied upon the service-specific rules previously adopted by the Commission in formulating business plans and making early efforts to obtain financing. As discussed below, however, we are retaining the discretion to use the revised general competitive bidding procedures adopted in this proceeding for any reauction of licenses in these services. We also note that while service-specific rules exist for the auction of the 220 MHz service, many of these rules are

---

Making, FCC 97-397 (rel. November 26, 1997) ("Broadcast NPRM").

[19] *See* Paging *Second Report and Order* and Further Notice of Proposed Rule Making; Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Third Report and Order* and Fifth Notice of Proposed Rule Making (rel. March 12, 1997) ("220 MHz *Third Report and Order* and Fifth Notice of Proposed Rule Making "); Amendment of Part 90 of the Commission's Rules to Facilitate the Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93- 144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, 11 FCC Rcd 1463 (1996); LMDS *Second Report and Order*.

similar, or refer to the Part 1 rules.[20] To apply the existing rules for the most part is also strongly supported by those commenters addressing the issue.[21] For example, AMTA states that the 220 MHz industry has encountered extraordinary delays in achieving regulatory certainty, and that amending or altering the auction rules for this service would create further uncertainty.[22] Consistent with our discussion below (*see* Section III.E.4), our decision regarding the establishment of minimum opening bids will apply to the initial auction of licenses in the paging and 220 MHz services. In addition, we note that several petitions for reconsideration are pending in these proceedings. In resolving these petitions, the Commission will address installment payment financing for licenses in these services in a manner consistent with our decision herein to temporarily suspend the use of installment payments.

8. Many of the commenters who support our proposal to adopt general competitive bidding procedures for all auctionable services argue that the Commission should, in its discretion, adopt or retain service-specific rules in particular instances.[23] Airadigm argues that the Commission should use existing service-specific rules where it would be unfair to allow

---

[20] See, e.g., 47 C.F.R.§ 90.1001.

[21] See, e.g., Nextel Comments at 2 and Reply Comments at 2; AMTA Comments at 4-5. The Commission received similar comments requesting that the rules adopted in this proceeding not be used for the initial auction of licenses in the 800 MHz service. *See* Nextel Comments at 2 and Reply Comments at 2. Because the 800 MHz auction closed on December 8, 1997, this issue is moot.

[22] AMTA Comments at 4-5.

[23] AT&T Comments at 1-2; AICC Reply Comments at 2; Airadigm Reply Comments at 6; NextWave Reply Comments at 2.

one group of licensees in the same service to benefit or be disadvantaged by operating under a different set of rules than its competitors in the same service (e.g., in the case of a reauction of licenses following bidder default).[24] Similarly, NextWave contends that the adoption of service-specific rules may be appropriate in some circumstances.[25] In a related argument, some commenters believe that, in certain instances, the rules adopted in this proceeding should not be applied retroactively to supersede previously adopted service-specific rules.[26] For example, AirTouch and WWC suggest that when service-specific rules have been adopted after industry participation and based upon particular characteristics of a specific industry or spectrum to be auctioned, those service-specific rules should govern.[27]

9. With regard to the auction of licenses to provide paging services, AirTouch opposes the Commission's proposal to apply general auction rules to all future auctions, regardless of whether service specific rules have been adopted.[28] AirTouch argues in particular that the Commission should not adopt a general stopping rule for the paging auction which would be contrary to the comments received in that proceeding and the stopping rule that the Commission ultimately adopted.[29] As discussed above, the Commission will use previously-adopted,

---

[24] Airadigm Reply Comments at 6.

[25] NextWave Reply Comments at 2-3.

[26] *See* PageNet Comments at 7-8; Airadigm Comments at 2; PCIA Comments at 2, Merlin Reply Comments at 7; ISTA Reply Comments at 1-2; AirTouch Reply Comments at 4-5; WWC Reply Comments at 1.

[27] AirTouch Reply Comments at 4-5; WWC Reply Comments at 1.

[28] AirTouch Reply Comments at 4-5.

[29] *Id.*

service-specific rules for the paging auction.

10. The rule changes we adopt today streamline and simplify our general competitive bidding procedures. The majority of the rules we adopt today address aspects of our spectrum auction program that affect future auction applicants only. These rules include application procedures (e.g., electronic filing, short-form application amendments, ownership disclosure requirements), upfront and down payment issues, issues relating to competitive bidding design, procedure and timing (e.g., alternate bidding methodologies, minimum opening bids, and bid withdrawal), and rules prohibiting collusion during the auction. However, some of the provisions we adopt today address aspects of our rules that govern current licensees as well. Specifically, these minor rule changes affect certain license-related payment terms (e.g., installment payments, grace periods, and unjust enrichment).

11. Two commenters, AICC and AAA, argue that the general competitive bidding procedures adopted in this proceeding would be wholly inappropriate for auctions of shared frequencies governed by Part 90 of the Commission's rules.[30] In support of this position, these commenters argue that: (1) none of the Commission's auctions have involved shared frequencies; (2) any auction of Part 90 shared spectrum would involve participants ranging in size from very large corporations to very small businesses and individual users, which would require a significant adjustment in the Commission's traditional auction rules; (3) industry participation would be crucial in crafting appropriate auction and service rules; and (4) in light of the public safety services

---

[30] AICC Comments at 1-2 and Reply Comments at 2; AAA Comments at 2 and Reply Comments at 2.

provided using Part 90 spectrum, auctioning such spectrum is not in the public interest.[31] AICC and AAA further suggest that those commenters who favor the adoption of general competitive bidding procedures for all spectrum might not have considered the possibility of auctions for shared channels, since the Commission is not currently authorized to award licenses for such spectrum by means of competitive bidding.[32] We agree that shared spectrum is, by definition, not auctionable under Section 309(j) due to the lack of mutual exclusivity.

12. Similarly, Hughes suggests that in the event the Commission decides to auction satellite services, it should conduct a service-specific rule making specially tailored to the capital intensive nature of the satellite industry, instead of employing the general competitive bidding procedures adopted in this proceeding.[33] Although we do not decide that issue now, as we suggested in the Notice, the Commission will continue to adopt service-specific auction procedures where we find that our general competitive bidding procedures are inappropriate.

B. Rules Governing Designated Entities

13. Section 309(j)(4)(D) of the Communications Act of 1934 provides that in prescribing rules for a competitive bidding system, the Commission shall "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based

---

[31] *Id.*

[32] AICC Reply Comments at 2; AAA Reply Comments at 2.

[33] Hughes Comments at 1, 6.

services."[34] The statute further directs the Commission to consider the use of tax certificates, bidding preferences, alternative payment schedules and methods of calculations and other procedures as means of accomplishing this statutory objective.[35]

14. We adopt the rules in this *Third Report and Order* in order to facilitate broad-based participation in auctions. We believe that standardizing the rules regarding definitions of eligible entities, unjust enrichment and bidding credits will assist small, minority and women-owned businesses because the rules' predictability will facilitate the business planning and capital fundraising process. While we suspend the use of installment payments, we seek comment in the Second Further Notice of Proposed Rulemaking on whether installment payments should be adopted in the future.

15. We also note that pursuant to Section 309(j)'s obligations to ensure opportunities for participation by small enterprises, rural telephone companies, and minority- and women-owned businesses, and Section 257 of the Telecommunications Act, requiring that the Commission identify and eliminate market entry barriers for small and entrepreneurial telecommunications businesses, we have commenced a series of studies, and have other studies in the planning process, to examine barriers encountered by minorities and women in the auctions process and the secondary market for licenses.[36] When those studies are

---

[34] 47 C.F.R.§ 309(j)(4)(D).

[35] *See* 47 C.F.R. ss 309(j)(3)(B) and (j)(4)(D).

[36] Pursuant to the Commission's report on Section 257 of the Telecommunications Act, adopted on May 7, 1997, the Commission found that further study was required to investigate barriers facing minorities and

completed, we will examine whether additional measures are warranted to promote the objectives of giving small businesses, rural telephone companies, and women- and minority-owned businesses the chance to provide spectrum-based services, as required in Section 309(j).

1. Small Business Size Standards

16. *Background*. In the Notice, we proposed to continue our practice, stated in Section 1.2110(b)(1) of our rules, of establishing "the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service."[37] We noted that thus far we have used gross revenue ceilings of $3 million, $15 million, $40 million, and $75 million to define small businesses (and $75 million and $125 million to define entrepreneurs),

---

women in the telecommunications industry, and delegated responsibility to the Office of Communications Business Opportunities ("OCBO") to conduct studies on this topic. To date, OCBO has commenced studies examining five major areas: (1) barriers to acquisition of cellular, paging and Specialized Mobile Radio licenses on the secondary market, and barriers to entry or growth, comparing small, large, minority and women-owned licensees; (2) barriers to acquisition of broadcast licenses on the secondary market, and barriers to entry or growth, comparing small, large, minority and women-owned licensees; (3) barriers to entry or growth due to advertising industry practices such as paying less to advertise on stations targeting minority communities, and the impact of such practices on ownership opportunities and viewpoint diversity; (4) the impact of duopoly and multiple ownership rules on broadcast station ownership; and (5) the impact of small, minority and women ownership of broadcast stations on service. The Commission is also planning to undertake a study on the experiences of small, minority- and women-owned businesses in the auctions process. *See* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Report), FCC 97-164 (rel. May 8, 1997) ("Section 257 Report").

[37] 47 C.F.R.§ 1.2110(b)(1). *See* Notice at pp 19-20.

which qualify for special provisions such as bidding credits and installment payments plans.[38] We also proposed, for purposes of future auctions, to define small businesses purely in terms of gross revenues. Once the small business definition for any particular service was adopted, we proposed that the special provisions for which such businesses qualify would be determined by schedules set forth in the general competitive bidding rules.[39]

17. We also noted in the Notice that some of our eligibility requirements are defined in terms of gross revenues of "less than" a certain amount, rather than "not exceeding" a certain amount. We tentatively concluded that a uniform method of measurement is preferable because it is more equitable and administratively simpler.[40] Thus, we proposed that when we adopt size standards, those standards should be expressed so as to require businesses to have gross revenues "not to exceed" particular amounts, and that all standards already adopted be

---

[38] 47 C.F.R.§ 90.814(b)(1)(i) ($3 and $15 million definition of small business in 800 MHz and 900 MHz SMR); 47 C.F.R.§ 24.720(b)(2) ($15 million definition of small business in broadband PCS F block); 47 C.F.R.§ 24.720(b)(1) ($40 million definition of small business in broadband PCS for C and F blocks); 47 C.F.R.§ 21.961(b)(1) ($40 million definition of small business in MDS) 47 C.F.R.§ 24.711(b)(1) ($75 million definition in broadband PCS C and F blocks); 47 C.F.R.§ 24.709(a)(l) ($125 million gross revenues threshold for determining entrepreneurs' block eligibility in the broadband PCS C and F blocks); and 47 C.F.R.§ 101.1112(d) ($15, $40 and $75 million gross revenues threshold for determining small business and entrepreneurs' block eligibility in LMDS).

[39] Notice at p 20; *see infra* at Section III. B.6.

[40] Notice at p 21.

modified to conform to this method of defining size.[41] We also proposed to base all small business size standards on the applicant's average gross revenues over the preceding three years.

18. *Discussion*. We adopt our proposal to continue to define small businesses, as we have in the past, based on the characteristics and capital requirements of the specific service. We believe that this approach has given us flexibility that will continue to benefit small businesses in future auctions. We also note that this approach is consistent with the Small Business Administration's practice of approving small business size standards on a service-by-service basis.[42] Commenters addressing this issue support this conclusion. For example, AMTA and NextWave both believe that the determination of appropriate small business size standards should be made on a case-by-case basis.[43]

19. No commenters addressed our proposal in the Notice to create size standards that require small businesses to have gross revenues "not to exceed," as opposed to "less than" a certain amount. Nevertheless, we believe that adoption of this proposal is important to further our objective of establishing

---

[41] For example, the eligibility rule for the broadband PCS C and F blocks would be modified to read "gross revenues not to exceed $125 million." *See* 47 C.F.R.§ 24.709.

[42] See, e.g., Letter to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, re: Approval of Small Business Size Standards - Competitive Bidding Rules for 800 MHz Specialized Mobile Radio Services (October 27, 1997).

[43] AMTA Comments at 5; NextWave Reply Comments at 3. *See also* Airadigm Comments at 2-3.

uniform definitions relating to small business standards for future auctions. From this point forward, our service-specific small business definitions will be expressed in terms of average gross revenues over the preceding three years "not to exceed" particular amounts. We also continue to believe that average gross revenues provide an accurate, equitable, and easily ascertainable measure of business size. As we have discussed in the past, a single gross revenues size standard is an established method for determining size eligibility for various kinds of federal programs that aid smaller businesses.[44] NextWave, in its comments, agrees, stating that gross revenues are a generally reliable measure of whether a company is indeed small.[45] In addition, while we have used a total assets test in determining eligibility for entrepreneur blocks,[46] we have not used such a test for determining small business eligibility. We also note that the Small Business Act's statutory definition of small business does not use a total assets test.[47] Thus, we decline to adopt any other measure of business size, such as a total assets test, at this time.[48]

---

[44] Fifth Memorandum Opinion and Order, p 23, PP Docket 93-253, FCC 94- 285 (Rel. November 23, 1994) (Fifth Memorandum Opinion and Order).

[45] NextWave Reply Comments at 3.

[46] See, e.g., 47 C.F.R.§ 709(a).

[47] *See* 15 U.S.C.§ 632(c).

[48] Parties in our LMDS proceeding requested that we consider a total asset test for LMDS. Under a "total assets" test, the Commission would exclude entities with total assets exceeding a specific threshold from eligibility for small business provisions. While we declined to adopt such a test for LMDS, we indicated that we would consider it in this proceeding. Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Petitions

2. Definition of Gross Revenues

20. *Background*. Previously, each of our revenue-based small business size standards for specific services has required applicants to calculate their average gross revenues over a certain number of years. In the Notice, we proposed to adopt a single definition of gross revenues to promote uniformity of regulation.[49] Specifically, we proposed to use our broadband PCS definition of gross revenues, subject to the modification that unaudited financial statements used as a basis for gross revenue calculations must be prepared in accordance with Generally Accepted Accounting Principles ("GAAP"). As we stated previously, this modification would ensure that all gross revenues calculations, audited and unaudited, will be prepared consistently from this point forward. This modification also would discourage bidders from manipulating unaudited financial statements in order to qualify for more advantageous bidding credits or payment terms.

21. In the D, E, and F Block Report and Order we amended our broadband PCS rules, which required that an applicant's determination of average gross revenues be based on the three most recently completed fiscal years, to allow for the use of fiscal or calendar years and simplified our rules to permit D, E, and F block applicants to use unaudited financial statements to support their statements of gross revenues.[50] We

---

for Reconsideration of the Commission's Competitive Bidding Rules, Second Order on Reconsideration, Docket 92-297 (rel. September 12, 1997) ("LMDS Second Order on Reconsideration") at p 22.

[49] Notice at p 23.

[50] Amendment of Parts 20 and 24 of the Commission's Rules, Report and Order, WT Docket No. 96-59, 11 FCC Rcd 7824, 7891, p 141 (1996) ("D, E, and F Block Report and Order"); 47 C.F.R.§ 24.720(f).

sought comment on whether we should incorporate this practice into our general auction rules and thereby permit future applicants in all auctionable services to use either fiscal or calendar years and unaudited financial statements to support statements of gross revenues.[51]

22. *Discussion*. All commenters addressing the issue support the Commission's proposal in the Notice to adopt a uniform definition of gross revenues for all auctionable services.[52] We believe that a uniform definition of gross revenues, as the essential element of our small business definitions, furthers our goal of establishing uniform definitions and is administratively efficient. Thus, we adopt a uniform definition of gross revenues in our Part 1 rules.

23. Various commenters addressed specific aspects of our proposed definition of gross revenues. CII supports our proposal that applicants be permitted to use either fiscal year or calendar year figures for calculation purposes.[53] No commenters opposed this proposal. We are persuaded that, just as we concluded in the D, E, and F Block Report and Order, permitting use of either of these figures will assist applicants in providing the most current information available on their applications.[54] We conclude that our general gross revenue definition should permit applicants to support their gross revenue calculations using either fiscal or calendar years.

---

[51] Notice at p 24.

[52] *See* CII Comments at 7; ISTA Comments at 1; Airadigm Comments at 3; AMTA Comments at 5; NextWave Reply Comments at 3.

[53] CII Comments at 7.

[54] D, E, and F Block Report and Order, at 134, 141.

24. Several commenters responded to our tentative conclusion in the Notice to accept the use of unaudited financial statements where audited financial statements are unavailable, if prepared in accordance with Generally Accepted Accounting Principles, for gross revenue calculations by auction applicants seeking to qualify for small business status. A majority of these commenters supported our tentative conclusion that where audited financial statements are not available, they should not be required.[55] In particular, these commenters argue that any strict requirement that financial statements be audited is unduly burdensome for most small business applicants.[56] In addition, AMTA contends that the certification requirement already present on the short-form (FCC Form 175) application is sufficient to ensure that small business applicants submit only accurate information, both financial and otherwise, as part of their applications.[57] Only two commenters, ISTA and PageNet advocate that applicants use audited financial statements in order to qualify for small business status.[58] After review of the comments on this issue, we conclude that such a requirement would be onerous to small business. We also agree with AMTA's observation that the certification requirement on our FCC Form 175 acts to ensure that applicants submit accurate information. Furthermore, as discussed below (*see* Section III.C.5, *infra*), we also will retain the authority to audit applicants individually if there is any question concerning small business status. We therefore decline to require all applicants to use audited financial

---

[55] *See* AMTA Comments at 5-6; CII Comments at 7, 11-12; Airadigm Reply Comments at 9, 11-12; NPCS Reply Comments at 4.

[56] *Id.*

[57] AMTA Comments at 6.

[58] *See* ISTA Comments at 1; PageNet Comments at 9.

statements to support their gross revenue calculations. Audited financial statements, however, are necessary if they exist. We also note that, consistent with the Small Business Act,[59] where an entity has been in existence for less than three years, the entity's gross revenues should be averaged for the relevant number of years the entity, or its predecessor in interest (affiliate), has been in existence.

25. Accordingly, as proposed in the Notice, and consistent with our broadband PCS rules,[60] we will define gross revenues for all auctionable services as:

> all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the three (3) most recent calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor- in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not have audited financial statements, its gross revenues must be certified by its chief financial officer or its equivalent and must be prepared in accordance with Generally Accepted Accounting Principles.

---

[59] *See* 15 U.S.C. § 632(c)9(ii)(II).

[60] 47 C.F.R.§ 24.720(f).

3. Definition of Affiliate

26. *Background*. We sought comment in the Notice on our definition of "affiliate." In seeking comment on this uniform Part 1 definition, we asked, for example, whether we should amend our definition of affiliate to provide an exception for Indian tribes and Alaska Regional or Village Corporations, as we did for broadband PCS and LMDS.[61] We also recognized that in August of 1996, the Small Business Administration amended and simplified its regulations governing small business size standards, including its definition of the term "affiliate",[62] and asked whether we should consider making similar changes to our rules.

27. *Discussion*. We adopt our proposal to adopt a uniform definition of the term "affiliate" for all future auctions. As we discussed in the Notice, the term "affiliate" is defined by our Part 1 rules as an individual or entity that directly or indirectly controls or has the power to control the applicant; is directly or indirectly controlled by the applicant; is directly or indirectly controlled by a third person(s) that also controls or has the power to control the applicant; or has an "identity of interest" with the applicant.[63] We have found that this definition, which also contains detailed discussion and examples of relevant terms such as "control" and "identity of interest," has proven workable and is broad enough to address a wide variety of business structures. In particular, this definition has helped to

---

[61] *See* 47 C.F.R. ss 24.720(l)(11), 101.1112(h)(11).

[62] *See* Small Business Administration, Amendment of Small Business Size Standards, Final Regulations, 61 Fed. Reg. 3177 (January 31, 1996); Corrected Final Regulations, 61 Fed. Reg. 41496 (August 9, 1996) (amending 13 C.F.R. Part 121).

[63] 47 C.F.R. ss 1.2110(b)(4), 24.839(d).

ensure that businesses seeking small business status are truly small. We also believe that this definition, by focusing on "indicia of control," is consistent with our proposal in the Second Further Notice of Proposed Rulemaking (*See* Section IV, *infra*).

28. CIRI requests that we include in our general definition of the term "affiliate" an exemption for Indian tribes and Alaska Regional or Village Corporations, as we did for broadband PCS,[64] and more recently, for LMDS.[65] We agree with CIRI that entities owned and controlled by Indian tribes and Alaska Regional or Village Corporations should be eligible to bid in future auctions as small businesses, notwithstanding their affiliation with other entities owned by tribes or Alaska Native Corporations whose gross revenues cause the combined average gross revenues of the entity and its affiliates to exceed the general limits for eligibility for bidding as such a business. As we stated in support of a similar exemption from our affiliation rules in LMDS, this exception will ensure that these entities will have a meaningful opportunity to participate in spectrum-based services from which they would otherwise be precluded.[66] Furthermore, we do not believe that this exemption for the specified entities will entitle them to an

---

[64] *See* 47 C.F.R.§ 24.720(l)(11).

[65] See 47 C.F.R.§ 101.1112(h)(11).

[66] See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services -- Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules; Suite 12 Group Petition for Pioneer Preference, CC Docket No. 92-297, Order on Reconsideration (rel. September 12, 1997) ("LMDS Order on Reconsideration") at p 10.

unfair advantage over entities that are otherwise eligible for small business status.[67]

29. We also take this opportunity to clarify our Part 1 definition of affiliate. Our Part 1 rules provide that parties to a joint venture are considered to be affiliated with each other for purposes of determining the gross revenues of an applicant seeking to qualify for status as a small business.[68] In the past, however, the term "consortium" has been defined on a service-by-service basis as "a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition of a very small business, small business or entrepreneur."[69] This results in each member of a consortium being defined as an affiliate of each other member. The resulting attribution of gross revenues of each member of the consortium is inconsistent with our intention to permit small or very small businesses to form consortia as a means of increasing the capital available to participate in our auctions, while still being eligible for status as a small business.

30. We therefore amend Section 1.2110(b)(4)(x) to provide that a "consortium" as defined on a service-by-service basis for purposes of determining status as a designated entity will not be treated as a "joint venture" under our attribution standards. As a result, when two or more entities form an association that meets the service-specific definition of a "consortium," the gross revenues of each entity will not be

---

[67] *Id.*

[68] See 47 C.F.R.§ 1.2110(b)(4)(x).

[69] See, e.g., 47 C.F.R.§ 101.1112(f) (defining the term "consortium" for LMDS).

attributed to each entity in determining eligibility for designated entity status. We believe that this clarification to the general definition of the term " affiliate" will enhance the ability of small businesses to form associations that will permit them to bid for licenses that would be too expensive for them individually. Auction winners have successfully used consortium structures to acquire licenses and "spin-off" licenses post-auction, and we wish to continue to make this option available.[70]

4. Definition of Rural Telephone Company

31. *Background.* Our current Part 1 rules define "rural telephone company" (or "rural telco") as any local exchange carrier, including affiliates, with 100,000 access lines or fewer.[71] We noted at the time this definition was adopted that it comported with the definition that had been adopted for broadband PCS.[72] In the Notice, however, we noted that we have revised the definition of rural telephone company contained in our broadband PCS rules to conform with that contained in the Communications Act, as amended by the Telecommunications Act of 1996 ("1996 Act").[73] We tentatively concluded that the definition of rural telco set forth in the 1996 Act should apply to all auctionable services.

---

[70] *See*"Rural Success Stories" in FCC Report to Congress on Spectrum Auctions, WT Docket No. 97-150, Report, FCC 97-353 (rel. October 9, 1997) ("Report to Congress") at 26.

[71] 47 C.F.R.§ 1.2110(b)(3).

[72] *Competitive Bidding Second Memorandum Opinion and Order*, 9 FCC Rcd at 7245, 7257.

[73] Pub. L. No. 104-104,§ 3 110 Stat. 56 (1996) ("1996 Act"); codified at 47 U.S.C.§ 153 (37). *See also* 47 C.F.R.§ 24.720(e) and D, E, and F Block Report and Order, 11 FCC Rcd at 7855, p 62.

32. *Discussion.* The National Telephone Cooperative Association ("NTCA") and the Rural Telecommunications Group ("RTG"), commented in support of our proposal in the Notice to adopt the definition of a rural telephone company contained in the Telecommunications Act of 1996 as the single definition of the term to be used in all auctionable services.[74] No commenters opposed our proposal. As we noted in the Notice, when we amended the broadband PCS rule, we stated that using the definition contained in the 1996 Act would likely expedite the delivery of advanced services to rural areas.[75] We also noted that adopting the 1996 Act definition would promote uniformity of regulations and is therefore consistent with the mandate of that legislation to ease regulatory burdens and eliminate unnecessary regulation.[76] We believe that the same reasons for amending this definition in the broadband PCS rules justify amending the definition in Part 1 for all services subject to competitive bidding.

33. Thus, we amend Section 1.2110(b)(3) to define the term "rural telephone company" as a local exchange carrier operating entity to the extent that such entity -- (A) provides common carrier service to any local exchange carrier study area that does not include either (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census, or (ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993; (B) provides telephone

---

[74] See NTCA Comments at 2; RTG Reply Comments at 1-3.

[75] See D, E, and F Block Report and Order, 11 FCC Rcd at 7855, p 66.

[76] *Id.*

exchange service, including exchange access, to fewer than 50,000 access lines; (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or (D) had less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

5. Installment Payments

34. *Background.* Section 309(j) of the Communications Act encourages participation by small businesses and other "designated entities" in the Commission's competitive bidding process.[77] Among other methods, allowing winning bidders to pay for their licenses using installment plans has been one method we have used to encourage small business involvement in the wireless marketplace. In the *Competitive Bidding Second Report and Order*, we adopted a framework for establishing installment payment plans that we believed would be an effective way to promote the participation of small businesses in the provision of spectrum-based telecommunications services and an effective tool for efficiently distributing licenses and services among geographic areas.[78] Our general competitive bidding rules currently allow small businesses to pay a substantial amount of their high bids in installments over the term of their licenses.[79] We observed in the Notice that small businesses have been successful bidders in the auctions in which installment payment plans were offered.[80] In the

---

[77] 47 U.S.C. ss 309(j)(4)(A), (D).

[78] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391, p 240.

[79] 47 C.F.R.§ 1.2110(e).

[80] See Notice at p 34. *See also* Report to Congress at 27.

Notice, we sought comment on a variety of proposals regarding our installment payment program intended to improve the ability of small businesses to participate successfully in future auctions. We also sought comment on whether we should offer higher bidding credits in lieu of installment payments.

35. In considering several petitions for reconsideration of the LMDS *Second Report and Order*, we recently eliminated installment payment provisions in LMDS and indicated that we would reexamine our installment payment rules in considering the general proposals regarding installment payments in this proceeding.[81] Similarly, we eliminated installment payment provisions in the upper 200 channels of the 800 MHz SMR service,[82] and deferred until this proceeding our decision on whether to make an installment payment plan available for the auction of the lower 80 and General Category channels in the 800 MHz SMR service.[83]

36. Earlier this year, the Commission received several requests, from both C and F block licensees, for relief

---

[81] See LMDS Second Order on Reconsideration. *See also*, Petitions for Reconsideration of the LMDS *Second Report and Order* filed by CellularVision USA, Inc. ("CellularVision"), WebCel Communications, Inc. ("WebCel"), Cook Inlet Region, Inc. ("Cook Inlet"), LBC Communications, Inc. ("LBC"), the Rural Telecommunications Group ("RTG"), the Independent Alliance, and Sierra Digital Communications, Inc.

[82] See 800 MHz Memorandum Opinion and Order and Order on Reconsideration at p 130.

[83] See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93- 144, *Second Report and Order*, FCC 97-223 (rel. July 10, 1997) at p 279.

associated with the installment payment program.[84] On March 31, 1997, in response to a joint request from several C block licensees seeking to modify their installment payment obligations, and because of other debt collection issues, the Bureau suspended the deadline for payment of installment payments for all C block licensees.[85] On April 28, 1997, the Bureau extended the suspension to F block licensees.[86]

37. On June 2, 1997, the Bureau, explaining that it had received several proposals from C block licensees regarding alternative financing arrangements and a petition for rule making regarding the issue of broadband PCS C block installment payments, issued the Installment Public Notice seeking comment on these proposals and invited any "additional proposals for addressing the C and F block broadband PCS financing terms."[87] The Bureau also sought comment on whether C block licensees should be permitted to

---

[84] See Installment Payment Public Notice. *See also* Letter from Thomas Gutierrez, Esq., et al to Michele C. Farquhar, Esq., Chief, Wireless Telecommunications Bureau (March 13, 1997).

[85] See Installment Payments for PCS Licenses, Order, DA 97-649 (rel. March 31, 1997).

[86] *See* "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block Licenses," Public Notice, DA 97-883 (rel. April 28, 1997) at 2.

[87] *Installment Payment Public Notice*. Several parties also filed petitions for reconsideration in the Commission's paging proceeding, in which they requested that the Commission reconsider its adoption of installment payment plans for small businesses. See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Petitions for Reconsideration, filed by Paging Network, Inc. and Personal Communications Industry Association, April 11, 1997.

prepay their installment debt.[88] After consideration of the extensive record in this proceeding, the Commission adopted a menu of options to assist C block licensees experiencing financial difficulties under their installment payment obligations.[89] Citing the difficulties encountered in the past, the Commission proposed not to adopt an installment payment plan for the reauction of licenses surrendered pursuant to these options.[90]

38. *Discussion.* After careful review of the comments in response to our general Part 1 rule making, the comments in response to the Installment Payment Public Notice, and our recent decisions in the broadband PCS C block, LMDS and 800 MHz SMR services, we have determined that installment payments should not be used in the immediate future as a means of financing small business participation in our auction

---

[88] The Bureau also conducted an "FCC Public Forum" on June 30, 1997, to discuss broadband PCS C and F block installment payment issues. In addition, the Commission established an FCC Task Force which included representatives from the Bureau, the Office of Plans and Policy, the Office of General Counsel, and the Office of Communications Business Opportunities. This Task Force was charged with evaluating the C block installment payment program, considering proposals for alternative financing arrangements submitted by licensees, and recommending to the Commission how to respond to those proposals.

[89] See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order* and Further Notice of Proposed Rule Making, WT Docket No. 97-82, 62 Fed Reg 55348 (rel. October 16, 1997) ("*Second Report and Order* and Further Notice of Proposed Rule Making").

[90] *Second Report and Order* and Further Notice of Proposed Rule Making at p 101.

program.[91] As we indicated in the *Second Report and Order* in this Docket, the Commission must balance competing objectives in Section 309(j) that require, inter alia, that it promote the development and rapid deployment of new spectrum-based services and ensure that designated entities are given the opportunity to participate in the provision of such services.[92] We note that our experience has demonstrated that installment payments may not be necessary to ensure a meaningful opportunity for small businesses to participate successfully in our auction program. For example, in the cellular auction of licenses for unserved areas, which had no special bidding provisions, 36 percent of the licenses went to small or very small businesses. We also stated that in assessing the public interest, we must try to ensure that all the objectives of Section 309(j) are considered. The Commission has found, for example, that obligating licensees to pay for their licenses as a condition of receipt requires greater financial accountability from applicants.[93]

39. In addition, questions have been raised in bankruptcy litigation about whether the Commission can quickly reclaim licenses should a licensee declare bankruptcy (even though licenses are expressly conditioned upon payment and cancel

---

[91] *See* "FCC Announces Spectrum Auction Schedule for 1998," Public Notice, DA 97-2497 (rel. November 25, 1997), announcing the following upcoming auctions: LMDS, 220 MHz, broadband C block Reauction, 39 GHz, Paging, 800 MHz SMR (Lower 80 and General Category Channels), Location Monitoring Services (LMS), Public Coast Stations, Pending Analog Broadcast Licenses for Commercial Radio and Television Stations. *See also* "FCC Announces Auction Schedule for the General Wireless Communications Service," Public Notice, DA 97-2634 (rel. December 17, 1997).

[92] See 47 U.S.C. ss 309(j)(3) and (4).

[93] See 800 MHz Memorandum Opinion and Order at p 130.

automatically in the event of nonpayment) resulting in significant delays in the provision of service to the public.[94] While we are confident of prevailing in any litigation, until controlling precedent is established or legislation addressing the conflicting rights is enacted, such delays may occur. In this regard, the Commission has strongly urged Congress to adopt legislation that would clarify that provisions of the Bankruptcy Code (1) are not applicable to any FCC license for which a payment obligation is owed; (2) do not relieve any licensee from payment obligations; and (3) do not affect the Commission's authority to revoke, cancel, transfer or assign such licenses.[95] We also note that, in order to balance the impact on small businesses of our decision to discontinue the use of installment payments in the near future, we are adopting higher bidding credits than those proposed in the Notice (see Section III.B.6, *infra*).

40. Therefore, subject to our proposals in the Second Further Notice of Proposed Rule Making, Section IV, *infra*, we conclude that until further notice, installment payments should not be offered in auctions as a means of financing small business and other designated entities seeking to secure spectrum licenses. Consistent with this decision, we hereby eliminate installment payments in the auction of the lower 80 and General Category channels in the 800 MHz SMR service.[96]

---

[94] Report to Congress at 39.

[95] See Report to Congress at 39. *See also* Letters from the FCC Commissioners (1) to the Honorable Orrin G. Hatch and the Honorable Patrick J. Leahy; and (2) to the Honorable Henry J. Hyde and the Honorable John Conors, both dated September 18, 1997; Letter from FCC Chairman Reed E. Hundt to the Honorable Pete Domenici and the Honorable John R. Kasich, dated July 25, 1997.

[96] See 800 MHz *Second Report and Order* at p 279.

Although Merlin submits that the elimination of the Commission's installment payment provisions in any service would be contrary to the Commission's conclusions in previous rule makings,[97] we believe that this decision is consistent with suggestions of CIRI, as well as our general experience in examining the success of the installment payment program to date.[98] As we recently recognized in eliminating installment payments for LMDS licensees, Congress did not require the use of installment payments in all auctions, but rather recognized them as one means of promoting the objectives of Section 309(j)(3) of the Communications Act.[99] The Commission

---

[97] Merlin Comments at 4.

[98] CIRI asserts that installment payment plans fueled speculation in the broadband PCS auctions, encouraged expectations of Commission relief from payment obligations, and saddled the Commission with difficult credit-related tasks for which it has no experience. CIRI further argues that installment payment programs force the Commission to balance its duty to regulate the provision of wireless services with its sometimes conflicting obligation to manage the federal debt responsibly. See CIRI Comments at 11; Petition for Rule Making Regarding the Administration and Disposition of Competitive Bidding Installment Payment Obligations filed by Cook Inlet Region, Inc. (May 7, 1997) ("CIRI Petition for Rule Making").

[99] Specifically, Section 309(j)(4) of the Communications Act states that the Commission shall, in prescribing regulations pursuant to these objectives and others, "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B) ...." See 47 U.S.C.§ 309(j)(4)(A) (emphasis added). *See also* Omnibus Budget Reconciliation Act of 1993, Report of the Committee on the Budget, House of Representatives, to Accompany H.R. 2264, A Bill to Provide for Reconciliation Pursuant to Section 7 of the Concurrent Resolution of the Budget for Fiscal Year 1994, May 25, 1993, at p. 255:

While it is clear that, in many instances, the objectives of section 309(j) will be best served by a traditional, "cash-on-the-barrelhead" auction, it is important that the Commission employ different methodologies as

continues to experiment with different means of achieving its obligations under the statute, and has offered installment payments to licensees in several auctioned wireless services.[100] Installment payments are not the only tool available to assist small businesses. Indeed, we have conducted auctions without installment payments.[101] Moreover, Section 3007 of the

---

appropriate. Under this subsection, the Commission has the flexibility to utilize any combination of techniques that would serve the public interest.

[100] See, e.g., Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330 (1994) (Interactive Video Data Services); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Third Report and Order*, 9 FCC Rcd 2941 (1994) ("Narrowband PCS *Third Report and Order*") (regional narrowband PCS); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532 (1994) (broadband PCS); Implementation of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995) (Multipoint Distribution Service); and Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Implementation of Sections 3(n) and 322 of the Communications Act, GN Docket No. 93-252, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639 (1995) (900 MHz Specialized Mobile Radio ("SMR")).

[101] Such as the auctions of licenses for the Wireless Communications Service ("WCS"), nationwide narrowband PCS, and cellular unserved areas. See, respectively, Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, Report and Order, FCC 97-50, 62 Fed. Reg. 9636 (rel. February 19, 1997) ("WCS Report and Order"); Narrowband PCS *Third Report and Order*; and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Amendment of Part 22 of the

Balanced Budget Act requires that the Commission conduct certain future auctions in a manner that ensures that all proceeds from such bidding are deposited in the U.S. Treasury not later than September 30, 2002. Although we seek comment on offering installment payment plans in the future (see Section IV), we believe that Section 3007 may require that these auctions be conducted without offering long-term installment payments.[102]

41. In this regard, we agree with commenters such as CIRI, that contend that increased bidding credits will allow responsible small bidders with appropriately tailored business plans to secure adequate private financing to be successful in future auctions.[103] Further, as we have already noted, Section 309(j) requires the Commission to consider alternative methods to allow for dissemination of licenses among designated entities, including small businesses. We believe that the rules we adopt below (see Section III.B.6, *infra*) regarding the use of bidding credits for small business applicants in future auctions will both fulfill the mandate of Section 309(j) to provide small

---

Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, CC Docket No. 90-6, Ninth Report and Order, 11 FCC Rcd 14769 (1996).

[102] See Section 3001 of the Omnibus Consolidated Appropriations Act for 1997, P.L. 104-208, 110 Stat. 3009 (1996) ("Omnibus Consolidated Appropriations Act"). *See also* the Balanced Budget Act of 1997. The Conference Report on the Balanced Budget Act of 1997 indicates that the deadline set forth in Section 3007 "applies to all competitive bidding provisions in this title of the conference agreement and any amendments to other law made in this title." Conference Report on H.R. 2015, Balanced Budget Act of 1997, Congressional Record -- House, Vol. 143, No. 109 -- Part II, at H6176.

[103] CIRI Petition for Rule Making.

businesses with the opportunity to participate in auctions and ensure that new services are offered to the public without delay.

42. Merlin contends that while significant bidding credits can be useful in helping smaller entities win licenses when they bid against larger companies, bidding credits alone do not help smaller entities access the capital required to build a spectrum-based service.[104] In addition, Merlin states that eliminating the installment payment plan would raise the cost of capital for small businesses which would be forced to borrow additional funds from commercial lenders at higher interest rates.[105] Merlin also argues that because many small businesses have relied on the current installment plan terms in formulating business plans necessary to bid in upcoming auctions, any decision to eliminate the installment payment program could effectively preclude small business participation in future auctions altogether.[106] We disagree with Merlin's assertions. As we have discussed, we believe that the increased bidding credits we adopt below will help fulfill the mandate of Section 309(j)(4)(D) of the Communications Act to provide small businesses with the opportunity to participate in spectrum-based services.[107] As noted above, this approach was successful in enabling small businesses to participate in the WCS auction, in which we were unable to employ installment

---

[104] Merlin Comments at 5.

[105] Merlin Comments at 7.

[106] Merlin Comments at 5-6.

[107] 47 U.S.C.§ 309(j)(4)(D). Additionally, providing a sufficient period of time for potential small business bidders to formulate their business plans is important. Congress acknowledged this in the Balanced Budget Act, and this is an issue to which we are sensitive. *See* "LMDS Auction Postponed Until February 18, 1998," Public Notice, DA 97-2352 (rel. November 10, 1997).

payments because of the statutory deadline for depositing auction revenues in the U.S. Treasury.[108] We also recently used this approach in establishing rules for the auction of licenses for 800 MHz SMR and LMDS.[109]

43. We recognize that the Commission previously adopted rules for both the 220 MHz and paging services that permit eligible small businesses to pay for their licenses in installments.[110] Several petitions for reconsideration have been filed in these proceedings that remain pending before the Commission.[111] The Commission will resolve these petitions separately in a manner consistent with our decision herein to suspend the use of installment payment plans at least until our rights to recover and reauction licenses in a timely fashion are established.

---

[108] See Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, Notice of Proposed Rulemaking, FCC 96-441, 61 Fed. Reg. 59048 (rel. November 12, 1996), at p 63; and WCS Report and Order at p 182. *See also* Section 3001 of the Omnibus Consolidated Appropriations Act.

[109] See 800 MHz MO&O. In the 800 MHz auction, 10 of the 14 bidders winning licenses qualified as either small or very small businesses. These bidders won 38 of 525 licenses offered.

[110] See 220 MHz *Third Report and Order*, 12 FCC Rcd at 10943, p 301; Paging *Second Report and Order* and Further Notice of Proposed Rule Making, 12 FCC Rcd at 2813-14, p 184.

[111] See, e.g., Arch Communications, Inc., Petition for Partial Reconsideration and Request for Clarification (filed April 11, 1997); Paging Network, Inc., Petition for Reconsideration and Clarification (filed April 11, 1997); Personal Communications Industry Association, Petition for Reconsideration (filed April 11, 1997).

6. Bidding Credits

44. *Background.* The current general competitive bidding rules provide for bidding credits (i.e., payment discounts) for eligible designated entities and state that service-specific rules will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits, and other procedures.[112] Thus, the Commission has adopted separate rules governing bidding credits for various auctionable services.[113] We proposed in the Notice that our general competitive bidding rules be amended so that the levels of available bidding credits are defined and uniform for all auctionable services. We proposed a schedule of bidding credits that we believed would provide adequate opportunities for small businesses of varying sizes to participate in spectrum auctions. We also asked how limiting the use of installment payments should affect the levels of bidding credits that are offered.

45. *Discussion.* Although all commenters addressing the issue are largely supportive of the use of bidding credits as a means of ensuring the widest possible participation in future auctions,[114] there is disagreement among commenters as to whether a standard schedule of bidding credits for small businesses is desirable. For example, CII supports our proposal to standardize the sliding scale of bidding credits that is

---

[112] 47 C.F.R.§ 1.2110(f).

[113] See, e.g. 47 C.F.R.§ 24.712.

[114] See Airadigm Comments at 6; CIRI Comments at 11-12; CII Comments at 13; PCIA Comments at 3; AMTA Comments at 10-11; Merlin Comments at 15-16 and Reply Comments at 3; Compu-DAWN Comments at 9; NTCA Comments at 2-3; RTG Reply Comments at 1, 6; NPCS Reply Comments at 5.

available to an applicant. Specifically, CII believes that granting businesses of different sizes different levels of bidding credits in different services threatens to result in inconsistent participation by small businesses in spectrum auctions.[115] In contrast, some commenters oppose any set schedule of bidding credits, and believe that the Commission should specify appropriate bidding credits for each auctionable service.[116] Among these, PCIA and AMTA believe that the Commission should continue to examine what constitutes an effective bidding credit on a service-by-service basis because the financing requirements of different spectrum-based services may necessitate use of different size bidding credits to provide the proper assurances that small businesses will be able to effectively compete.[117] As we stated in the Notice, we believe that an approach in which we provide certainty for future auctions about the size of available bidding credits will benefit small businesses because potential bidders will have more information well in advance of the auction than previously about how such levels will be set.[118] Once a small business definition is adopted for a particular service, eligible businesses will benefit they are able to refer to a schedule in our Part 1 rules to determine the level of bidding credit available to them. We therefore adopt our proposal to create a standard schedule of bidding credits.

46. In light of our decision (see Section III.B.5, *supra*) to suspend installment payment financing for the near future, we

---

[115] CII Comments at 13.

[116] See PCIA Comments at 3; AMTA Comments at 10-11; Compu-DAWN Comments at 9.

[117] PCIA Comments at 3; AMTA Comments at 10-11.

[118] See *supra* at p 36-38.

have determined that higher bidding credits than those proposed in the Notice would better effectuate our statutory mandate. Airadigm supports larger bidding credits than those proposed by the Commission.[119] Similarly, CIRI contends that unless the Commission is prepared to establish the creditworthiness of installment payment applicants, the Commission should offer substantial bidding credits to small businesses in lieu of government financing.[120] We note that some commenters argue that, in relation to installment payment provisions, bidding credits are less effective in allowing designated entities to participate in the Commission's auction program.[121] For example, Pocket states that bidders often "bid through" bidding credits and that bidding credits tend to result in higher bids and, in general, higher auction prices.[122] We believe that without installment payments, bidding credits, coupled with providing bidders sufficient time to raise financing, will enable small businesses to successfully compete in future auctions. Also, tiered bidding credits have proven to work well and provide for more competition between small business participants of different sizes. The use of tiered bidding credits was successful in enabling small businesses to participate in the WCS auction, in which we were unable to employ installment payments because of the statutory deadline for depositing auction revenues in the U.S. Treasury.[123] Finally, while we recognize Pocket's concerns about the possibility that bidders "bid through" bidding credits, we do not believe that this problem is significant where not all bidders are eligible for

---

[119] Airadigm Comments at 6, Reply Comments at 9.

[120] CIRI Comments at 11 and Reply Comments at 2-3.

[121] See, e.g., Merlin Reply Comments at 3.

[122] Pocket Comments at 4-5.

[123] See WCS Report and Order, 12 FCC Rcd at 10785, p. 182.

bidding credits, and the size of the bidding credit varies among those who are eligible.

47. Consistent with this reasoning, we adopt the following schedule of bidding credits for use in future auctions in which provisions for designated entities are offered:

Average Annual Gross Revenues	Bidding Credits
Not to exceed $3 million	35%
Not to exceed $15 million	25%
Not to exceed $40 million	15%

We recognize that these credits are higher than some previously adopted for specific services.[124] Based on our past auction experience and the suspension of installment payments, however, we believe that the approach taken here will provide adequate opportunities for small businesses of varying sizes to participate in spectrum auctions.

48. We recognize that Merlin recommends providing higher bidding credits than those which we adopt.[125] Specifically, Merlin suggests that (1) businesses with average gross revenues for the preceding three years not exceeding $3 million be eligible for bidding credits of 40 percent; (2)

---

[124] For instance, a business with average gross revenues of not more than $3 million in the 900 MHz SMR auction received a 15% bidding credit rather than the 35% bidding credit we adopt. See 47 C.F.R.§ 90.814(b)(2). In contrast, our decision is consistent with our rules for the broadband PCS F block, in which a business with average gross revenues of not more than $15 million received a 25% bidding credit. See 47 C.F.R.§ 24.717(b).

[125] Merlin Comments at 15-16.

businesses with average gross revenues for the preceding three years not exceeding $15 million be eligible for bidding credits of 35 percent; and (3) businesses with average gross revenues for the preceding three years not exceeding $40 million be eligible for bidding credits of 25 percent.[126] As discussed above, we believe that higher bidding credits than those proposed in the Notice are necessary now that our installment payment program is suspended. We believe that the schedule of bidding credits we adopt is reasonable in light of our decision to suspend installment payments for services auctioned in the immediate future, and expect that it will prove sufficient to enable small businesses to obtain spectrum licenses through our auction program. Thus, we decline to adopt Merlin's proposal. We also note that we seek comment in this Second Further Notice of Proposed Rule Making on means other than bidding credits and installment payments by which the Commission might facilitate the participation of small businesses in our spectrum auction program.

7. Unjust Enrichment

49. *Background.* In the Notice, we observed that unjust enrichment provisions in our general competitive bidding rules and service-specific rules vary. Under our general competitive bidding rules, a licensee seeking Commission approval of a transfer of control or an assignment of a license acquired through the competitive bidding process utilizing installment payments is required to pay the remaining principal balance as a condition of the transfer. No payment is required, however, when the proposed transferee or assignee is qualified to obtain the same installment financing and assumes the applicant's

[126] Merlin Comments at 17-18.

installment payment obligations.[127] In the broadband PCS unjust enrichment rule, however, we specify that applicants seeking to assign or transfer control of a license to an entity not meeting the eligibility standards for installment payments must pay not only unpaid principal as a condition of Commission approval but also any unpaid interest accrued through the date of assignment or transfer.[128] This rule also provides that if a licensee utilizing installment financing seeks to make any change in its ownership structure that would result in the loss of eligibility for installment payments, it must pay the unpaid principal and accrued interest as a condition of Commission approval of the change.[129] Finally, in recognition of the tiered installment payment plans offered to broadband PCS licensees, the rule provides that if a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan, it must seek Commission approval and adjust its payment plan to reflect its new eligibility status.[130] A licensee, under this rule, may not switch its payment plan to a more favorable plan.

50. Under our general competitive bidding rules, a licensee seeking Commission approval of a transfer of control or an assignment of a license acquired through the competitive bidding process utilizing bidding credits, or proposing to take any other action relating to ownership or control that will result in loss of eligibility for such bidding credits, is required to pay the sum of the amount of the bidding credit plus interest as a

[127] 47 C.F.R. § 1,2111(c).

[128] 47 C.F.R. § 24.716(d)(1).

[129] 47 C.F.R. § 24.716(d)(2).

[130] 47 C.F.R. § 24.716(d)(3).

condition of FCC approval.[131] Under our broadband PCS rules, if, within the original term, a licensee applies to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify must be paid as a condition of approval of the assignment or transfer.[132] We proposed to amend our general unjust enrichment rules to conform them to our broadband PCS rules.

51. We also requested comment in the Notice on whether we should adopt a uniform unjust enrichment provision, and if so, whether it should be modeled on those we have recently adopted for some other services that provides a scale of decreasing payment liability for licensees that received a bidding credit based on the number of years a license is held.[133] We also requested comment on unjust enrichment rules as they apply to partitioning and disaggregation.[134] We asked whether, assuming we decide to adopt partitioning and disaggregation for various services, how the unjust enrichment rules should apply when the partitioner or disaggregator is the recipient of a bidding credit or is paying on an installment payment plan. We also asked whether we should adopt for all auctionable services the same provisions that we adopted for broadband

---

[131] 47 C.F.R. § 1.2111(d).

[132] 47 C.F.R. §§ 24.712(b)(2), 24.717(c)(2).

[133] See, e.g., 47 C.F.R. § 90.81(b)(1) (SMR).

[134] See Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, Report and Order and Further Notice of Proposed Rule Making, 11 FCC Rcd 21831 at 21851, pp 31-36, 55 (1996) ("Partitioning and Disaggregation Report and Order").

PCS.[135]

52. *Discussion*. We adopt our proposal to conform our Part 1 unjust enrichment rules to the broadband PCS rules. We believe that effective unjust enrichment rules are necessary to ensure that meaningful small business participation in spectrum-based services is not thwarted by transfers of licenses to non-designated entities. As we stated in the Notice, the broadband PCS unjust enrichment rules are preferable to our current general unjust enrichment rules because they provide greater specificity about funds due at the time of transfer or assignment and specifically address changes in ownership that would result in loss of eligibility for installment payments, which the current general rules do not address. The broadband PCS rules also address assignments and transfers between entities qualifying for different tiers of installment payments or bidding credits, thus supplying clearer guidance for auctions in which tiered installment payment plans or bidding credits are provided. Commenters addressing this issue largely support this decision. For example, Pocket and Ericsson both argue that modified unjust enrichment rules would still deter transfers designed to subvert the Commission's rules, but would provide businesses with more flexibility in situations of financial distress and permit the transfer of individual licenses that no longer comport with their business plans.[136]

53. Current as well as future licensees will be governed by the rules we adopt providing for unjust enrichment payments upon assignment, transfer, partitioning and disaggregation. While we did not receive significant comment on this issue, we note that in awarding licenses in the past, the Commission has

---

[135] *Id.*

[136] Pocket Comments at 6; Ericsson Reply Comments at 4.

emphasized that the terms associated with the continued grant of a license will be governed by current Commission rules and regulations. For example, in awarding licenses to C block licensees paying for their licenses in installments, the Commission indicated in the associated " Note" and "Security Agreement" that the terms of the installment plan would be governed by and construed in accordance with then-applicable Commission orders and regulations, as amended. Therefore, we conclude that the unjust enrichment rules we adopt apply to existing licensees, and supersede service-specific rules where applicable. Specifically, these rules will supersede existing unjust enrichment provisions in the narrowband and broadband PCS, WCS, 900 MHz, and IVDS services.[137] As discussed above (see Section III.B.5, *supra*), we suspend the use of installment payments for the immediate future as a means of financing small business participation in our auction program. As a result, our decision with regard to unjust enrichment payments as they relate to licensees paying for their licenses in installment payments will apply only to existing licensees, their transferees and assignees (until we reinstate installment payments).

a. Installment Payments

54. For existing licensees who make use of Commission installment payment financing, we amend Section 1.2111(c) to conform to our broadband PCS rules. Specifically, if a licensee seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid

[137] See 47 C.F.R. ss 24.309(f) (narrowband PCS), 24.711 (C block), 24.716(d) (F block), 27.209(d)(1), (2) (WCS), 90.812(b) (900 MHz), 95.816(e) (IVDS).

principal and any unpaid interest accrued through the date of the assignment or transfer as a condition of Commission approval. Similarly, if the licensee seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee must first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval.[138] If a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan, the licensee must seek Commission approval and must adjust its payment plan to reflect its new eligibility status.[139]

b. Bidding Credits

55. For existing and future licensees who qualified or qualify in the future for a bidding credit in paying for their winning bid, we also amend Section 1.2111(c) to provide for unjust enrichment payments similar to those contained in our broadband PCS rules. Specifically, during the term of the initial license grant, if a licensee seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for bidding credits, or seeks to make any other change in ownership that would result in the licensee no longer qualifying for a bidding credit, the licensee must seek

[138] We note that, consistent with out broadband PCS rules, a licensee's (or other attributable entity's) increased gross revenues or increased total assets due to nonattributable equity investments (i.e., from sources whose gross revenues and total assets are not considered under § 24.709(b)), debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing eligibility for installment payments.

[139] A licensee may not switch its payment plan to a more favorable plan.

Commission approval and must reimburse the government for the amount of the bidding credit, plus interest based on the rate for U.S. Treasury obligations applicable on the date the license is granted, as a condition of the approval of such assignment, transfer or other ownership change.[140] Similarly, if the licensee seeks to assign or transfer control of its license to an entity meeting the eligibility standards for lower bidding credits, or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and must pay to the United States Treasury the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible as a condition of the approval of such assignment, transfer or other ownership change. These provisions also will apply to licensees who partition or disaggregate their licenses.

56. We also adopt our proposal in the Notice to provide for decreasing unjust enrichment payments for licensees that utilized a bidding credit when paying for their licenses and that make transfers and assignments occurring later in the license term. This decision also is supported by the commenters.[141] In amending the rule in this manner, we ensure that our general rule resembles those rules the Commission has adopted in specific services (e.g., MDS, narrowband PCS, and 900 MHz SMR) that reduce the amount of unjust enrichment payments due on transfer based upon the amount of time the initial license has been held.[142] Consistent with the rules that exist in

---

[140] But see *Second Report and Order* and Further Notice of Proposed Rule Making.

[141] See ISTA Comments at 2; CII Comments at 13-14.

[142] Ericsson Reply Comments at 4-5.

these services,[143] the amount of this payment will be reduced over time as follows: A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or, in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible); in year three of the license term the payment will be 75 percent; in year four the payment will be 50 percent; and in year five the payment will be 25 percent, after which there will be no payment. These assessments will have to be paid to the U.S. Treasury as a condition of approval of the assignment, transfer, or ownership change. All current and future licensees, with the exception of entrepreneur block licensees subject to restrictions on assignments and transfers of licenses,[144] will be governed by this modification to our general rules. We believe that our decision to maintain the original transfer restrictions for such licensees is proper in light of the special provisions which were made available for licensees in our entrepreneur blocks.[145]

c. Unjust Enrichment and Partitioning and Disaggregation

57. Also as proposed in the Notice, we will adopt a general rule modeled on our broadband PCS rules to determine the amount of unjust enrichment payments assessed for all current and future licensees.[146] Thus, we adopt a general unjust

---

[143] See, e.g., 47 C.F.R.§ 90.810(b)(i) (SMR).

[144] See 47 C.F.R.§ 24.839(d).

[145] See, e.g., 47 C.F.R.§ 90.810(b)(1) (SMR). But see Broadcast NPRM at p 95 (seeking comment on somewhat different unjust enrichment provisions).

[146] Notice at p 43; Partitioning and Disaggregation Report and Order.

enrichment rule that treats partitioning and disaggregation by licensees in the same manner as the broadband PCS rule. Specifically, if the licensee seeks to partition any portion of its geographic service area, the amount of the unjust enrichment payment discussed above will be calculated based upon the ratio of population in the partitioned area to the overall population of the licensed area.[147] Similarly, if a licensee seeks to disaggregate spectrum, the amount of the unjust enrichment payment will be determined based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the disaggregating licensee.[148]

C. Application Issues

1. Electronic Filing

58. *Background.* Sections 1.2105(a) and 1.2107(c) of our rules govern the filing of short-form and long-form applications.[149] In recent auctions, we have allowed applicants to file their applications either manually or electronically and required applicants to submit exhibits to short-form and long-form applications that were filed manually on a 3.5 inch diskette in ASCII text (.txt) format. Only applicants that have filed their short-form applications electronically have been allowed to bid electronically from remote locations; applicants filing manually have been required to bid telephonically. In the Notice, we tentatively concluded that Sections 1.2105(a) and 1.2107(c) of our rules should be amended to require electronic

---

[147] Partitioning and Disaggregation Report and Order, 11 FCC Rcd at 21851, pp 31-36.

[148] Partitioning and Disaggregation Report and Order, 11 FCC Rcd at 21862, p 55.

[149] 47 C.F.R. ss 1.2105(a) and 1.2107(c). *See also* n.7.

filing of all short-form and long-form applications, beginning January 1, 1998.[150]

59. *Discussion.* We believe that electronic filing of all short-form and long-form applications for auctionable services is in the best interest of auction participants, as well as members of the public monitoring Commission auctions. Therefore, we amend Sections 1.2105(a) and 1.2107(c) of our rules to require electronic filing of all short-form and long-form applications, beginning January 1, 1999, unless it is not operationally feasible.[151] Although in the Notice we proposed to require electronic filing commencing January 1, 1998, we believe that this additional phase-in period before the requirement becomes effective will benefit potential bidders. The majority of the comments addressing the issue support the decision to require electronic filing.[152] For example, PageNet contends that electronic filing promotes access to applications by competing bidders, as well as the general public, by making it possible to review and download applications without traveling to FCC headquarters or contracting for photocopying of paper applications.[153] To facilitate public access, the Commission has developed user-friendly electronic filing software and Internet World Wide Web forms to give auction applicants the ability to conveniently file and review

---

[150] Notice at p 46.

[151] 47 C.F.R. ss 1.2105(a) and 1.2107(c).

[152] See, e.g., AT&T Comments at 2; PageNet Comments at 16; AMTA Comments at 11.

[153] PageNet Comments at 16.

applications.[154] This software helps applicants ensure the accuracy of their applications as they are filling them out, and enables them to correct errors and omissions prior to submitting their applications. To assist the public, we provide technical support personnel to answer questions and work with callers using the electronic auction system. In addition, the Commission has demonstrated its auction software at conferences organized by potential bidders and members of the industry in order to familiarize interested parties with our recent software enhancements.

60. AT&T is generally supportive of electronic filing, but proposes that the Commission create a waiver process whereby an applicant that has missed a filing deadline due to technical problems can obtain a waiver quickly or be permitted to submit a paper original of the application by hand or mail the same day.[155] In addition, AT&T requests that a Commission staff member be provided with the authority to grant such a waiver in the event of electronic filing difficulties.[156] We do not believe that a specific waiver provision is necessary. The Commission's existing waiver provisions, which specify the showing required for the grant of a waiver, provide adequate assurance that requests for waiver relating to the electronic

---

[154] We assess no fee for filing applications electronically but currently charge $2.30 a minute for reviewing or downloading applications of other parties on line. See Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, Online Communications Service Charges and Bidder's Information Packages in Connection with Auctionable Services, Report and Order, No. 95-308, 60 Fed. Reg. 38276 (July 26, 1995). The public can also download other auctions related documents for no charge from the FCC internet site (<<backslash>>http<<backslash>>www.fcc.gov).

[155] AT&T Comments at 2.

[156] *Id.*

filing of applications will receive proper consideration.[157] In addition, we emphasize that the Commission has typically responded rapidly to time-sensitive waiver requests filed by auction applicants, and we intend to continue to do so in the future.[158]

61. Only one commenter, Airadigm, opposes an electronic filing requirement. Airadigm states that the Commission experienced difficulties in processing electronic filings during the IVDS auction and argues that removing the option of manual filing could result in similar problems in future auctions.[159] We believe that the system enhancements discussed above, most of which were not in place during the IVDS auction, adequately respond to Airadigm's concerns. We also note that our experiences from recent auctions demonstrate that the electronic bidding system is reliable. For example, in the broadband PCS D, E, and F block auction, 94 percent of the qualified bidders filed their short-form applications electronically. In the recently completed 800 MHz SMR auction, 93 percent of the qualified bidders filed their short-form applications electronically. We did not experience problems with our electronic filing procedures.

---

[157] *See, e.g.*, 47 C.F.R. § 24.819.

[158] See, e.g., Letter to James Hillyard, Alaskan Choice Television, L.L.C., from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau (April 23, 1997) (responding to Alaskan Choice Television, L.L.C.'s Petition for Waiver of the Upfront Payment Deadline). *See also* Letter to Mr. John Prawat, DigiVox Telecom, Inc., from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, DA 97- 730 (April 11, 1997) (responding to DigiVox Telecom, Inc.'s Request for Rule Waiver of the Upfront Payment Requirement in the WCS Auction).

[159] Airadigm Comments at 9.

62. Finally, as we stated in the Notice, we recognize that there is a need for a period of time before a comprehensive electronic filing requirement becomes effective in order for bidders to prepare and be completely comfortable with this process.[160] The effective date of January 1, 1999, will provide potential bidders with adequate time in which to adapt to electronic filing requirements.[161] Finally, although we conclude that electronic filing is the preferred filing method, we nevertheless reserve the right to provide for manual filing in the event of technical failure or other difficulties.

2. Short-form Application Amendments

63. *Background.* Section 1.2105(b) of our rules addresses modifications and amendments to applicants' short-form (FCC Form 175) applications. Specifically, Section 1.2105(b)(2) provides that bidders may make minor changes or correct minor errors in the FCC Form 175 application, but that major amendments may not be submitted after the initial application deadline.[162] This section further provides that the Commission will classify all amendments as major or minor pursuant to service-specific rules.[163] In the Notice, we proposed to amend our general auction rules to create a uniform definition for major amendments to FCC Form 175 for all auctionable services.[164] We proposed at a minimum to consider any change

---

[160] Notice at p. 46.

[161] We note that this phase-in period is similar to the approach taken by the Securities and Exchange Commission when it eliminated paper financial filings. See 17 C.F.R.§ 232.902(a).

[162] 47 C.F.R. § 1.2105(b).

[163] *Id.*

[164] Notice at p 48.

in ownership that constitutes a change in control to be a major amendment. We also proposed to consider application amendments that show a change in an applicant's size which would affect its eligibility for small business provisions as a major amendment.[165] Finally, we sought comment on what other kinds of changes should be deemed major or minor.[166]

64. We also indicated in the Notice that in previous auctions, applicants have claimed that they made mistakes in their license selection and have requested that the Commission allow them to add or delete license selections during the resubmission period.[167] While the Bureau has generally refused to grant these requests in order to prevent collusive conduct or gaming that would reduce the competitiveness of the auction, we recognized that there may be some circumstances in which the competitiveness of the auction might be enhanced by allowing applicants to add licenses to their FCC Form 175 applications. We sought comment on whether an amendment to add licenses should be permissible as a minor amendment.[168] We also asked whether such an amendment should be permitted only until the deadline for submitting upfront payments, because after that point the risks of gaming in the auction increase due to the availability of information concerning each bidder's eligibility.[169]

---

[165] *Id.*

[166] *Id.*

[167] *Id.* The Commission may provide a limited opportunity, after the deadline for filing short-form applications has passed, for applicants to correct minor defects and then resubmit their corrected applications. The decision as to whether to provide such a resubmission period is made on a service-by-service basis.

[168] *Id.*

[169] *Id.*

65. *Discussion*. The majority of commenters support our proposal in the Notice to create a uniform definition of major and minor amendments to applicants' short-form (FCC Form 175) applications for all future auctions.[170] However, commenters' opinions differ on what types of amendments the Commission should categorize as major or minor. For example, AT&T and ISTA argue that major amendments should include all changes in ownership that constitute a change in control, as well as all changes in size that would affect an applicant's eligibility for designated entity provisions.[171] In contrast, Metrocall contends that all changes in ownership incidental to mergers and acquisitions, non-substantial pro forma changes, and involuntary changes in ownership should be categorized as minor.[172] Metrocall also states that an applicant should not be permitted to upgrade its designated entity status after the short form filing deadline (i.e., go from a "small" to "very small" business), but should be permitted to lose its designated entity status as a result of a minor change in control (i.e., exceed the threshold for eligibility as a small business).[173]

66. After careful consideration of the comments addressing the issue, we believe that a definition of major and minor amendments similar to that provided in our PCS rules,[174] is appropriate. After the short-form filing deadline, applicants will be permitted to make minor amendments to their short-

---

[170] See Airadigm Comments at 9; AT&T Comments at 2-3.

[171] AT&T Comments at 2-3; ISTA Commetns at 2.

[172] Metrocall Comments at 6-7.

[173] *Id.* at 8.

[174] 47 C.F.R. § 24.822.

form applications both prior to and during the auction. However, applicants will not be permitted to make major amendments or modifications to their applications after the short-form filing deadline. Major amendments will include, but will not be limited to, changes in license areas designated on the short-form application, changes in ownership of the applicant which would constitute a change in control, and the addition of other applicants to any bidding consortia. Consistent with the weight of the comments addressing the issue,[175] major amendments will also include any change in an applicant's size which would affect an applicant's eligibility for designated entity provisions. For example, if Company A, an applicant that qualified for special provisions as a small business, merges with Company B during the course of an auction, and if, as a result of this merger, the merged company would not qualify as a small business, the amendment reflecting the change in ownership of Company A would be considered a major amendment. Otherwise, the new entity could receive small business bidding credits and installment payments when it does not qualify for them. As is the case in our PCS rules, however, applicants will be permitted to amend their short-form applications to reflect the formation of bidding consortia or changes in ownership that do not result in a change in control of the applicant, provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas.[176] In contrast, minor amendments will include, but will not be limited to, the correction of typographical errors and other minor defects, and any amendment not identified as major.

---

[175] *See* AT&T Comments at 2-3; ISTA Commets at 2. *See also* Metrocall Comments at 8.

[176] *See* 47 C.F.R. § 1.2105(c).

67. As noted above, the Commission has generally refused to grant requests to add or delete markets on an applicant's short-form application in order to prevent collusive conduct or gaming that would reduce the competitiveness of the auction. While we recognize that there may be some circumstances in which the competitiveness of the auction might be enhanced by allowing applicants to add markets to their short-form applications, we conclude that the risks of encouraging or facilitating conduct that negatively affects the competitiveness of the auction and the post-auction market structure outweigh the benefits of categorizing such amendments as minor. Several commenters support this conclusion that the addition or deletion of markets on the short-form application should always be deemed a "major" amendment.[177] Specifically, PageNet states that because the only new information that an applicant could be deemed to possess at this stage would be licenses on which other applicants intend to bid, amendment of the short-form application in this regard could only lead to auction abuses.[178] Those commenters supporting defining the addition or deletion of markets after the short-form filing deadline as a minor amendment argue that such an amendment should only be permitted prior to the upfront payment deadline or the release of the Public Notice announcing qualified bidders.[179] After this point, the overall competitiveness of the auction may be threatened.[180]

---

[177] *See* ISTA Comments at 2; PageNet Comments at 8-9.

[178] PageNet Comments at 8.

[179] *See* PCIA Comments at 3-4; AirTouch Comments at 5-6; Airadigm Comments at 9-10.

[180] *See, e.g.,* AirTouch Comments at 5-6 and Reply Comments at 6.

68. AT&T proposes that the deletion of markets to avoid specifying markets that overlap with another auction application (and thus preventing discussion on potentially non-auction-related matters such as interconnection, resale, and equipment orders that do not affect bids or bidding strategies) be deemed a minor amendment.[181] We note that in previous auctions some applicants have inadvertently placed themselves at risk of violating the Commission's anti-collusion rule by choosing to specify "all markets" on their short-form applications when they intended to bid only on a particular license or group of licenses. As a general matter, the anti-collusion rule does not prohibit non- auction-related business negotiations between auction applicants that have applied for the same geographic service areas.[182] AT&T argues that the aspect of the rule prohibiting the addition or deletion of markets often has had the unfortunate result of discouraging non-auction, business-related discussions between auction applicants who are not actually bidding for licenses in the same geographic license areas.[183] Because of the potential anti-competitive results of allowing bidders to delete markets after the short-form filing deadline, however, we believe that this type of error can be more effectively addressed by other means, including increased awareness on the part of prospective auction applicants of the consequences of choosing "all markets," as well as software enhancements that make specifying particular markets on the FCC Form 175 less burdensome.

69. We also emphasize that, pursuant to Section 1.65 of

---

[181] AT&T Comments at 2-3.

[182] *See* Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96-1566, Sept. 17, 1996, at 1-2.

[183] AT&T Comments at 2-3.

the Commission's rules, each auction applicant is required to assure the continuing accuracy and completeness of information furnished in a pending application.[184] Each applicant is therefore under a continuing obligation to update its short-form and long-form applications as appropriate to reflect any changes that would make a pending application inaccurate or incomplete, or that are necessary to determine that an applicant is in compliance with our rules.[185] As in all prior auctions, an application that is amended by a major amendment will be considered newly filed, and therefore will not be accepted after the short-form filing deadline.[186] We further note that the Commission has waived its ex parte rules as they apply to the submission of amended short-form applications to maximize applicants' opportunities to seek the advice of Commission staff when making amendments at any time after the short-form filing deadline.[187]

70. Finally, we note that in the context of cellular unserved area licensing, WWC contends that the rules adopted in this proceeding addressing major and minor amendments to short-form applications should not apply to cellular unserved area applications filed in 1994 as these applications were to be

---

[184] 47 C.F.R. § 1.65.

[185] See, e.g., Letter to Linda Feldmann from Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 97-2261 (rel. October 24, 1997).

[186] See 47 C.F.R.§ 1.2105(b)(2).

[187] See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Second Order on Reconsideration and Seventh Report and Order, PP Docket No. 93-253, 11 FCC Rcd 2639, 2679, p 104 (1995), and "Commission Announces that Mutually Exclusive "Short-Form" Applications (Form 175) to Participate in the Competitive Bidding Process ("Auctions") Are Treated as Exempt for Ex Parte Purposes," Public Notice, 9 FCC Rcd 6760 (1994).

governed by a "letter-perfect" standard and applicants were given no opportunity to cure minor defects.[188] While we have considered WWC's argument, we believe that it is inapplicable. WWC addresses the initial application procedures for cellular unserved area licenses, while the Part 1 rules, in contrast, address application procedures for participation in an auction once a finding of mutual exclusivity has been made.

3. Ownership Disclosure Requirements

71. *Background.* Currently, our general competitive bidding rules do not set forth any ownership disclosure requirements for auction applicants on their short-form applications. As we recognized in the Notice, however, our service-specific rules require varying degrees of specific ownership information from applicants.[189] For example, in the 900 MHz SMR auction, an applicant claiming small business status was required to disclose on the short-form application the names of each affiliate and a gross revenues calculation. On the long-form application, such an applicant was required to disclose an additional gross revenues calculation, any agreements that support small business status, and any investor protection agreements.[190] At the same time, both our narrowband PCS and broadband PCS rules require detailed ownership disclosure from all auction applicants that differ from each other and from the 900 MHz SMR requirement. Rules for narrowband and broadband PCS also impose additional requirements for applicants claiming small business status. Finally, although the broadband PCS disclosure

---

[188] WWC Comments at 2-3.

[189] Notice at pp 49-50.

[190] 47 C.F.R. § 90.815(b).

requirements are very similar to those for narrowband PCS, we have recently amended the broadband PCS application requirements to make them less burdensome on applicants.[191]

72. In the Notice, we sought comment on whether to adopt standard ownership disclosure requirements for all auctionable services in order to eliminate these inconsistencies from service to service.[192] Specifically, we proposed to adopt standard disclosure requirements that are similar to our current rules for broadband PCS. We sought comment on what ownership information should be required.[193] We also proposed to adopt a uniform reporting requirement for all applicants claiming small business status, and proposed to model this requirement on the 900 MHz SMR rules.[194]

73. *Discussion*. As we indicated in the Notice, we continue to believe that detailed ownership information is necessary to ensure that applicants claiming small business status qualify for such status, and to ensure compliance by all applicants with spectrum caps and other ownership limits.[195] Disclosure of ownership information also aids bidders by providing them with information about their auction competitors and alerting them to entities subject to our anti-collusion rules. Therefore, we adopt standard ownership disclosure requirements for all auctionable services that will avoid the variations found in our current service-specific

---

[191] 47 C.F.R. § 24.813.

[192] Notice at p. 51.

[193] *Id.*

[194] 900 MHz SMR Report and Order; Bidder Information Package for 900 MHz SMR (November 28, 1995).

[195] Notice at p. 51.

ownership disclosure requirements.

74. This decision is widely supported by the majority of comments in this proceeding. Most commenters addressing the issue of ownership disclosure support requiring some level of ownership information at the short-form application stage.[196] For example, PCIA believes that full disclosure of bidder ownership information is necessary if competing bidders are to accurately assess the legitimacy of their auction opponents and their respective bids.[197] PCIA contends that there can be no valid reason for legitimate bidders to hide their ownership. Such information, according to PCIA, is crucial for purposes of the Commission's anti-collusion rules, spectrum caps, and other ownership limits.[198] Similarly, PageNet contends that full ownership disclosure is important to aid bidders in compiling information about their auction competitors and, most importantly, to alert them to any conduct that might be a violation of the Commission's anti- collusion rules.[199] In the satellite context, Hughes argues that the submission of detailed ownership information is essential because of the extreme costs associated with the build-out of a satellite system.[200] In contrast, only CII argues that the Commission's objectives with regard to the rules governing designated entity status, spectrum caps, and other ownership limitations would be fully satisfied by deferring the filing of comprehensive ownership information

---

[196] *See* PCIA Comments at 4, ISTA Comments at 2; PageNet Comments at 2-3; Hughes Comments at 6-7.

[197] PCIA Comments at 4.

[198] *Id.* at 4. *See also* ISTA Comments at 2.

[199] PageNet Comments at 2-3.

[200] Hughes Comments at 6-7.

until the long-form application stage.[201]

75. For all future auctions, therefore, we will model our reporting requirements on the general application requirements contained in our broadband PCS rules.[202] Under this standard, all auction applicants will be required to disclose the real party or parties in interest by including as an exhibit to their short-form applications detailed ownership information. Although our current Part 1 rules require auction applicants to list all owners of a five percent or greater interest in the applicant, we agree with commenters such as CII that argue that applicants should not be required to list all holders of this small an interest in the applicant, unless they are in a position of control by virtue of other factors (i.e., voting agreements, management structure), or hold a significant passive ownership interest (i.e., 20 percent).[203] Thus, we amend our rules to require that applicants list controlling interests as well as all parties holding a 10 percent or greater interest in the applicant and any affiliates of these interest holders.[204] A 10 percent or greater interest reporting requirement is consistent with the revised definition of the term "applicant" we adopt for purposes of the anti-collusion rule (See Section III.F, infra). We note that PageNet contends that the Commission should require disclosure of entities and individuals that own more than five percent of the applicant or who have provided more than five percent of the applicant's equity.[205] However, as suggested above, we believe that the detailed reporting requirement we

---

[201] CII Comments at 13-14.

[202] *See* 47 C.F.R. § 24.813.

[203] CII Comments at 14-15.

[204] *See* 47 C.F.R. § 1.2110(b)(4).

[205] Id at 6.

create today, in combination with our comprehensive affiliation rules (see Section III.B.3, *supra*), permits us to determine the "real party or parties in interest"[206] when parties apply to participate in an auction.

76. Specifically, all auction applicants will be required to disclose: (1) a list of any FCC-regulated business, 10 percent or more of whose stock, warrants, options or debt securities are owned by the applicant; (2) a list of any party holding a 10 percent or greater interest in the applicant, including the specific amount of the interest; (3) a list of any party holding a 10 percent or greater interest in any entity holding or applying for any FCC- regulated business in which a 10 percent or greater interest is held by another party which holds a 10 percent or greater interest in the applicant (e.g., if company A owns 10% of company B (the applicant) and 10% of company C, a company holding or applying for an FCC-regulated business, the companies A and C must be listed in company B's application); (4) the name, address and citizenship of any party holding 10 percent or more of each class of stock, warrants, options or debt securities, together with the amount and percentage held;[207] (5) the name, address and citizenship of all

---

[206] See 47 C.F.R. § 24.813(a).

[207] For purposes of determining ownership interests, stock interests held in trust shall be attributed to (1) any person who holds or shares the power to vote such stock; (2) any person who has the sole power to sell such stock; and (3) in the case of stock held in trust, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust (See 47 C.F.R.§ 20.6(d)(3)). Non-voting stock shall be attributed as an interest in the issuing entity if equal to or greater than 20 percent of the value of the entity (See 47 C.F.R.§ 20.6(d)(4)). Debt and instruments such as warrants, convertible debentures, options, or other interests (except non-voting stock) with rights of

controlling interests of the applicants, as this term is defined in Section 1.2110 of our rules; (6) if the applicant is a general partnership, the name, address and citizenship of each partner, and the share or interest participation in the partnership; (7) if the applicant is a limited partnership, the name, address and citizenship of each general partner and each limited partner whose interest in the applicant is equal to or greater than 10 percent (as calculated according to the percentage of equity paid in and the percentage of distribution of profits and losses); (8) if the applicant is a limited liability corporation, the name, address and citizenship of each of its members; and (9) a list of all parties holding indirect ownership interests in the applicant, as determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain, that equal 10 percent or more of the applicant, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated and reported as if it were a 100 percent interest.[208]

77. In addition, consistent with the reporting requirements set forth in the 900 MHz SMR rules,[209] we will require that applicants claiming small business status disclose on their short-form applications the names of each controlling interest and affiliate, as these terms are defined in this proceeding, and to provide gross revenues calculations for each. On their long-form applications, such applicants will be required to disclose any additional gross revenues calculations, any agreements that support small business status, and any investor protection agreements. We believe that these reporting requirements will

---

conversion to voting interests must treated as if fully exercised.

[208] See, e.g., 47 C.F.R. § 20.6(d)(8).

[209] 900 MHz SMR Report and Order; Bidder Information Package for 900 MHz SMR (November 28, 1995).

help to assure that only qualifying applicants obtain the benefits of our small business provisions, without being unduly burdensome.

78. Finally, in a related proposal, PageNet states that Commission should expressly prohibit "blind bidding" (i.e., bidding in which auction participants do not know the identities or ownership information of the other bidders in the auction) in any pending and future auction because it (1) is unfair to auction participants; (2) encourages auction abuses; and (3) encourages speculation.[210] PageNet contends that these factors can have a significant impact upon the competitiveness of the auction and the post-auction marketplace.[211] In situations in which an incumbent has already met the Commission's build-out requirements and must still bid in an auction in which blind bidding is used, PageNet contends that a competitor is often able to bid up the price of a license that it never intends to win in order to force the incumbent to buy the license at a higher price. PageNet further contends that this higher price is then reflected in higher rates for services, which in turn affect the incumbent's ability to compete.[212] As discussed above, we agree that it is important that auction applicants disclose certain ownership information prior to the start of an auction. At the same time, however, we believe that in certain circumstances, the competitiveness of an auction may be increased if less bidder information is made available. In the *Competitive Bidding Second Memorandum Opinion and Order*, we retained the flexibility to conceal bidder identities if further experience

---

[210] *Id.*

[211] *Id.* at 4/

[212] *Id.*

showed that it would be desirable to do so.[213] More recently, in the auction rules for geographic area paging licenses, the Commission concluded that the advantages of limiting information disclosed to bidders outweigh the disadvantages of this approach, and reserved the discretion to announce by Public Notice prior to the auction the precise information to be revealed to bidders during that auction.[214] We believe that the uniform rules we adopt today provide us with the necessary flexibility to tailor the amount of bidder information made available to applicants to ensure the competitiveness of each auction. We therefore decline to adopt a provision prohibiting non-disclosure of bidder identities in all future auctions.

4. Ownership Disclosure Filings

79. *Background*. Currently, the Commission's ownership disclosure rules require applicants to file specific ownership information in conjunction with their FCC Form 175 applications prior to each auction.[215] Similarly, at the close of each auction, winning bidders are required to file ownership information on each long-form application.[216] In the Notice, we tentatively concluded that we should permit applicants to file ownership information to apply for the first auction in which they participate, and we would store this information in a central database which would be updated each time applicants

---

[213] See *Competitive Bidding Second Memorandum Opinion and Order*, 9 FCC Rcd at 7252, p 42.

[214] See Paging *Second Report and Order* and Further Notice of Proposed Rule Making, 12 FCC Rcd at 2803, p 160.

[215] See 47 C.F.R.§ 1.2105(a)(2). *See also* FCC Form 175 pp 1-5, 8-10, certification and exhibit requirements (October 1995).

[216] See 47 C.F.R. ss 1.2107(c) - (d). *See also*, FCC Form 601 pp 1-16, 29-33, and 39 (January 1995).

participate in another auction.[217] We proposed that an applicant filing for a subsequent auction would either update the ownership information in the database, or certify that there have been no changes in ownership status.[218]

80. *Discussion*. We believe that permitting applicants to file ownership information when they apply for their first auction, which would then be stored in a central database and updated each time the information changes during or after the first auction and when applicants participate in a subsequent auction, will streamline our application processes and minimize the burden on auction applicants. This concept is supported by the record.[219] For example, CII and Airadigm argue that this approach will benefit auction applicants by reducing the time spent preparing auction applications, and will benefit the Commission by eliminating the need to review and analyze duplicative filings.[220] We believe that by requiring ownership disclosure filings, we ensure that we receive all the information necessary to evaluate an applicant's qualifications. As we indicated in the Notice, however, these requirements could result in duplicative filings.[221] For example, where licenses for a service are offered in a series of blocks, as in the case of broadband PCS, an entity may wish to participate in several auctions, and would be required to disclose the same information a number of times.[222] Under the system we

---

[217] Notice at p. 54.

[218] *Id.*

[219] See AMTA Comments at 11-12; Airadigm Comments at 10; Hughes Comments at 7; ISTA Comments at 2; CII Comments at 15.

[220] See CII Comments at 15; Airadigm Comments at 11.

[221] Notice at p 54.

[222] 47 C.F.R. ss 24.413, 24.709(c) and 24.813.

envision, when applying to participate in subsequent auctions, applicants will be permitted to update the database or certify that there have been no changes in ownership and that the information contained in the database remains correct. We will look to implement this process in the near future as part of our Universal Licensing System.[223]

5. Audits

81. *Background.* Under our broadband PCS auction rules, we have reserved the right to conduct random audits of auction applicants and licensees in order to verify information provided regarding their eligibility for certain special provisions.[224] These rules require that entities certify their consent to such audits on their short-form applications.[225] In the Notice, we proposed to explicitly reserve this right for all auctionable services.

82. *Discussion.* The only commenters to address this proposal, PageNet and Airadigm, support this proposal.[226] Airadigm requests that applicants and licensees subject to audit be afforded sufficient time to provide information to the Commission and that the Commission issue written findings following its examination.[227] We therefore adopt our proposal, and will modify our rules governing status as a designated

---

[223] See generally "Wireless Telecommunications Bureau Universal Licensing System Registration Now Available," Public Notice (rel. November 4, 1997).

[224] 47 C.F.R. § 24.709(d).

[225] *Id.*

[226] PageNet Comments at 9.

[227] Airadigm Comments at 11-12.

entity to expressly provide that applicants and licensees claiming eligibility for special provisions shall be subject to audits by the Commission. Such audits will be governed by the standards set forth in Sections 403 and 308(b) of the Communications Act.[228] We believe that these provisions, as well as the general provisions of the Administrative Procedure Act,[229] will adequately address Airadigm's concerns, and we therefore decline at this time to adopt specific rules to govern audits of applicants and licensees conducted in the future.

D. Payment Issues

1. Determination of Upfront Payment Amount

83. *Background.* Section 1.2106 of our rules provides that the Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment in order to be eligible to bid in an auction.[230] Although not specifically addressed in the Notice, we received significant comment on the proper upfront payment to be required for participation in future auctions.

84. *Discussion.* In the *Competitive Bidding Second Report and Order*, we indicated that the upfront payment should be set using a formula based upon the amount of spectrum and population (or "pops") covered by the license or licenses for which parties intend to bid.[231] We reasoned that this method of

---

[228] 47 U.S.C.§§ 403, 308(b).

[229] See 5 U.S.C. § 551 *et seq.*

[230] 47 C.F.R.§ 1.2106(a). *See also* 47 C.F.R.§ 1.2110(g).

[231] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377, p 169.

determining the required upfront payment would enable prospective bidders to tailor their upfront payment to their bidding strategies.[232] At the same time, however, we noted that determining an appropriate upfront payment involved balancing the goal of encouraging bidders to submit serious, qualified bids with the desire to simplify the bidding process and minimize implementation costs imposed on bidders.[233] We concluded that the best approach would be to maintain the flexibility to determine the amount of the upfront payment on an auction-by-auction basis, because this balancing may yield different results depending upon the particular licenses being auctioned.[234]

85. Many commenters make specific proposals regarding the proper size and terms for assessing upfront payments in future auctions. For example, PageNet and CII suggest that the Commission adopt a standard upfront payment rule requiring separate upfront payments for each license identified in an applicant's short-form application.[235] CII contends that this would reduce the number of "phantom" mutual exclusivities (i.e., theoretical frequency conflicts caused by the fact that the current auction rules create no financial disincentive to list licenses in an application on which the applicant has no bona fide intention to bid).[236] In contrast, Airadigm and NPCS argue that the Commission should not require a separate upfront payment for each license on which an entity elects to bid, as this would limit bidders' flexibility to change strategy and force

---

[232] *Id.*

[233] *Id.* at 2378.

[234] *Id.*

[235] PageNet Comments at 11; CII Comments at 11.

[236] CII Comments at 11-12.

them to reveal their bidding strategy prior to the start of the auction.[237] In an alternate proposal, AirTouch and CII suggest that the Commission require applicants to increase their upfront payments as an auction progresses to equal a percentage of their total bids.[238] AirTouch argues that this requirement would reduce the risk of defaults and discourage parties from submitting "jump bids" where they have no intention of actually winning a particular license.[239] Similarly, to reduce the risk of default, CII recommends that when an applicant's upfront payment drops below a specific percentage of its high bid amount, the Commission allow the applicant to increase its deposit to a certain percentage of its high bid total within ten business days.[240] In contrast to these two proposals, Airadigm opposes increasing the upfront payment requirement once a bidder's bid amount exceeds a certain multiple of the original upfront payment amount because this would create a significant barrier to small businesses.[241]

86. We agree with Airadigm and NPCS that it is unnecessary to adopt additional rules governing the amount of the upfront payment and the terms under which it is assessed. We believe that our reasoning in the *Competitive Bidding Second Report and Order* remains valid, and that the required upfront payment should be tailored to the particular auction design and to the characteristics of the licenses being

---

[237] Airadigm Reply Comments at 7; NPCS Reply Comments at 5-6.

[238] AirTouch Comments at 6 and Reply Comments at 2-3; CII Comments at 10-11.

[239] AirTouch Comments at 6 and Reply Comments at 2-3.

[240] CII Comments at 10-11.

[241] Airadigm Reply Comments at 6.

auctioned.[242] This determination can be made in a variety of ways and using a variety of techniques to estimate the value of the spectrum being auctioned; however, as a general rule we have required an upfront payment equal to $0.02 per pop per megahertz. As discussed *infra*, under the current competitive bidding rules the Commission maintains the discretion to alter the amount of the required upfront payment or to modify the terms under which the upfront payment is assessed.[243] We believe that retaining this discretion provides the Commission with the greatest level of flexibility to determine the appropriate upfront payment amount on an auction-by-auction basis.

2. Refund of Upfront Payments

87. *Background.* Section 309(j)(8)(C) of the Communications Act requires that any deposits the Commission may require for the qualification of any person to bid in an auction shall be deposited into an interest bearing account.[244] The Communications Act further requires that within 45 days of the auction's conclusion, the deposits of successful bidders shall be paid to the United States Department of Treasury ("Treasury"), the deposits of unsuccessful bidders shall be returned, and all accrued interest shall be transferred to the Telecommunications Development

---

[242] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377, p 170.

[243] See, e.g., LMDS *Second Report and Order*, 12 FCC Rcd at 12545, p 330.

[244] 47 U.S.C.§ 309(j)(8)(C). This provision was added by the Telecommunications Act of 1996, Pub. L. No. 104-104,§ 3, 110 Stat. 56 (1996).

Fund ("TDF").[245] Prior to the enactment of this provision, auction proceeds were deposited in a non- interest bearing account with the U.S. Treasury. The Commission has permitted bidders who completely withdraw during the auction to receive a refund of their upfront payments prior to the close of the auction, upon written request. In the Notice, we sought comment on whether this practice should be continued.[246]

88. *Discussion.* After considering the issue in light of Congress's 1996 amendment to Section 309(j)(8)(C) and the comments received in this proceeding, we will continue our current practice of returning the upfront payments of bidders who have completely withdrawn from an auction prior to the conclusion of competitive bidding. As we suggested in the Notice, it is unclear whether Congress intended, in amending Section 309(j)(8)(C), to require the Commission to change its practice of refunding upfront payments to bidders who withdraw during the course of an auction.[247] We continue to believe, however, that the prompt return of upfront payments is in the public interest, because it prevents unnecessary encumbrances on the funds of auction bidders, many of whom may be small businesses, after they have withdrawn from the auction. In addition, we believe that this practice minimizes the financial burdens of participating in an auction, because auction participants earn no interest on upfront payment funds on deposit with the Commission. Moreover, all commenters addressing the issue support our proposal to continue this

---

[245] *Id.*

[246] Notice at p 57.

[247] *Id.*

practice.[248] AirTouch proposes that the Commission retain an administrative fee based upon the number of rounds an applicant has remained in the auction when it refunds upfront payments to bidders who have withdrawn.[249] Airadigm and AT&T state that not returning upfront payments in a prompt manner in circumstances where a bidder has withdrawn is akin to a "fee" that Congress did not intend to authorize, and that may work to discourage participation in the Commission's auction program.[250] We agree with Airadigm and AT&T, and conclude that such a fee is inappropriate, and therefore, we reject AirTouch's proposal.

3. Down Payment and Full Payment for Licenses

a. Level of Down Payments

89. *Background.* Previously, the Commission required a winning bidder to submit additional funds as necessary to bring its total deposits up to 20 percent of its high bid(s) within five business days after being notified that it is a high bidder on a particular license.[251] In the Order accompanying the Notice, we modified our rules to establish a due date for down payments of ten business days after the issuance of a Public Notice announcing winning bidders.[252] In the Notice, we proposed to retain discretion to determine the down payment amount

[248] See AT&T Comments at 3-4; AirTouch Comments at 7; Airadigm Comments at 12 and Reply Comments at 8; AMTA Comments at 12; CII Comments at 15-16; ISTA Comments at 2 and Reply Comments at 3.

[249] AirTouch Comments at 7.

[250] Airadigm Reply Comments at 8-9; AT&T Comments at 3-4.

[251] 47 C.F.R. §1.2107(b).

[252] See Notice at p 14.

required for each service and to delegate this authority to the Bureau, which will announce this amount in a Public Notice to be issued prior to the start of each auction.[253] We also noted that in an effort to help to determine the appropriate down payment amount for a particular service, the Bureau will seek input from the public. We also sought comment on whether the level of down payments used in the past should be raised for some services.[254]

90. *Discussion.* We created the down payment requirement in the *Competitive Bidding Second Report and Order*, in which we concluded that at the conclusion of the auction, a bidder must tender a significant and non-refundable down payment to the Commission over and above its upfront payment in order to provide further assurance that the winning bidder will be able to pay the full amount of its winning bid.[255] We believe that a substantial down payment is required to ensure that licensees have the financial capability to attract the capital necessary to deploy and operate their systems, and to protect against default. Because it is due soon after the close of the auction, the down payment is a valuable indicator of a license applicant's financial viability. In addition, we believe that it is important that we learn early on in the licensing process when an applicant might be unable to finance its winning bid or bids.

91. Several commenters oppose any increase in the down

[253] Notice at p 59.

[254] *Id.*

[255] *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348, 2381, pp 189-92.

payment beyond 20 percent of the high bid amount.[256] Airadigm opposes granting the Bureau the discretion to establish a down payment amount because it believes that the Bureau could unfairly disadvantage small businesses by requiring disproportionately large down payments for auctions of particularly capital- intensive services.[257] In addition, Airadigm states that granting the Bureau this discretion could complicate applicants' financing arrangements because down payment amounts could vary with each auction. After consideration of these comments, we conclude that a standard down payment amount of 20 percent is appropriate. Finally, if unusual circumstances present themselves in the context of a particular service, the Commission reserves the right to adopt a different amount by rule in that service.

b. Untimely Second Down Payments and Full Payments

92. *Background.* Section 1.2109(a) of the Commission's rules[258] provides that auction winners not eligible for installment payments are generally required to make final payment on their license(s) within a certain time following award of the license(s). Similarly, Section 1.2110(e) of the Commission's rules[259] provides that all winning bidders eligible for installment payments are required to submit a second down payment within a certain period after conditional license grant. These payment deadlines are announced by public notice when

---

[256] See CII Comments at 10, Merlin Comments at 12; AMTA Comments at 9; Airadigm Comments at 12; NPCS Reply Comments at 5.

[257] Airadigm Comments at 12.

[258] 47 C.F.R. §1.2109(a).

[259] 47 C.F.R. §1.2110(e).

the Commission is prepared to grant the license(s). Where a winning bidder fails to make its final auction payment for the balance of its winning bid in a timely manner, it is considered in default on its license(s) and subject to the applicable default payment.[260] In the Notice, we proposed to allow winning bidders to make their final payments or second down payments within a short period after the applicable deadline, provided that they also pay a late fee.[261] We also sought comment on our tentative conclusion that if a winning bidder misses the final payment or second down payment deadline and also fails to remit the required payment and the applicable late fee by the end of the late payment period, it would be declared in default and subject to the applicable default payments.[262] Additionally, we sought comment on whether a late payment of five percent of the amount due is an appropriate late payment fee, and asked that commenters proposing alternative late payment fee(s) provide a rationale for the alternative fee amount(s).[263] Finally, we sought comment on the appropriate time period toallow late second down payments and final payments.[264]

93. *Discussion.* We will amend Sections 1.2109(a) and 1.2110(e) of our rules to permit auction winners to make their second down payments or final payments within ten business days after the applicable deadline, provided that they also pay an appropriate late fee, without being considered in default. As we recognized in the Notice, in past auctions there have been cases where a winning bidder missed the applicable second

---

[260] 47 C.F.R. ss 1.2104(g), 1.2107(c).

[261] Notice at p 61.

[262] *Id.*

[263] *Id.* at p 62.

[264] *Id.* at p 61.

down payment deadline but subsequently made its down payment and filed a request seeking a waiver of the deadline. In some of these cases, the Bureau granted the waivers, subject to payment of a five percent late fee. In granting the waivers, the Bureau recognized the licensee's good faith and ability to pay as evidenced by its timely remittance of all earlier payments and prompt action to cure the delinquency.[265]

94. We recognize that applicants may encounter unexpected or unforeseeable difficulties when trying to arrange financing and make substantial payments under strict deadlines. In circumstances that may warrant favorable consideration of a waiver request or an extension of the payment date, we must also evaluate the fairness to other licensees who made their payments in a timely fashion. Two commenters, Mountain Solutions, Ltd. ("Mountain Solutions") and AirTouch, the only commenters to address this issue in detail, support our proposal to permit late payment subject to a standard late fee for any licensee not able to make a timely payment.[266] We agree, and

---

[265] See, e.g., Roberts-Roberts & Associates, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Various BTA Markets, Order, DA 97-252, (rel. February 4, 1997); Longstreet Communications International, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market B012, Order, DA 97- 251 (rel. February 4, 1997). But see Styles Interactive, Inc. -- Application for Review of Denial of Petition for Reconsideration Seeking Waiver of IVDS Final Down Payment Deadline, Memorandum Opinion and Order, FCC 97-390 (rel. October 28, 1997) and Mountain Solutions LTD, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B053, B168, B172, B187, B188, B224, B247, B275, B366 and B381, Order, DA No 97-891 (rel. April 28, 1997) recon pending (denying requests for waiver of the second down payment deadline).

[266] See Mountain Solutions Comments at 2 and Reply Comments at 2-3; AirTouch Comments at 7-8.

amend Section 1.2109(a) to permit winning bidders who are required to make final payment on their licenses within a certain period of time as announced by public notice, to submit their payment 10 business days after the payment deadline, provided that they also pay a late fee equal to five percent of the amount due. Although we suspend the use of installment payments for the immediate future, in the event the Commission once again offers installment payments, we also amend Section 1.2110(e) to permit auction winners paying for the licenses in installments to submit their second down payment 10 business days after the payment deadline, provided they also pay a late fee equal to five percent of the amount due.

95. As discussed above, our rules provide that winning bidders have ten business days to make timely payment following notification that their licenses are ready to be granted. We believe that in establishing this additional ten business day period, during which winning bidders will not be considered in default, we provide an adequate amount of time to permit winning bidders to adjust for any last-minute problems. We decline to provide for a lengthier late payment period because we believe that extensive relief from initial payment obligations could threaten the integrity, fairness, and efficiency of the auction process. As we observed in the Notice, a late fee of five percent is consistent with general commercial practice and provides some recompense to the federal government for the delay and administrative or other costs incurred.[267] In addition, we believe that a five percent fee is large enough to deter winning bidders from making late payments and yet small enough so as not to be punitive.[268] Therefore, applicants who

---

[267] Notice at p 62. See, e.g., Eldon H. Reiley, Guidebook to Security Interests in Personal Property, at § 4.02(iii) (1989).

[268] Mountain Solutions Comments at 2 and Reply Comments at 3.

do not submit the required final payment and five percent late fee within the 10- day late payment period will be declared in default, and will be subject to the default payment specified in Section 1.2104(g) of our rules.[269]

96. Finally, we emphasize that our decision to permit late payments is limited to payments owed by winning bidders who have submitted timely initial down payments. We continue to believe that the strict enforcement of payment deadlines enhances the integrity of the auction and licensing process by ensuring that applicants have the necessary financial qualifications. In this connection, we believe that the bona fide ability to pay demonstrated by a timely initial down payment is essential to a fair and efficient auction process. Thus, we have not proposed to modify our approach of requiring timely submission of initial down payments that immediately follow the close of an auction. We did not propose to adopt a late payment period for down payments that are due soon after the close of the auction as we believe it is reasonable to expect that winning bidders timely remit their down payments, given that it is their first opportunity to demonstrate to the Commission their ability to make payments toward their licenses. Further, if a winning bidder defaults on its down payment on a license, the Commission can take action under Section 1.2109(b) relatively soon after the auction has closed, by, for example, re-auctioning the license or offering it to the other highest bidders (in descending order) at their final bids. Similarly, we do not allow for any late submission of upfront payments, as to do so would slow down the licensing process by delaying the start of an auction.

[269] See 47 C.F.R. § 1.2104(g).

c. Full Payment and Petitions to Deny

97. *Background.* In the Notice, we recognized that under our current rules, winning bidders not eligible for installment payments are not required to submit the balance of their winning bids until petitions to deny filed against them are dismissed or denied and their licenses are ready to be granted.[270] Similarly, winning bidders that are designated entities paying in installments are not required to pay their second down payments until petitions to deny filed against them are dismissed or denied and their licenses are ready to be granted. In the interim, winning bidders for the same auction with no petitions filed against them are required to submit the balance of their winning bids (or, in the case of designated entities, their second down payments) earlier because their licenses are ready for grant. In the Notice, we sought comment on whether we should require all bidders that win licenses to make their full payments (or second down payments) at the same time.

98. *Discussion.* As discussed above (see Section III.B.5, *supra*), we suspend the use of installment payments as a means of financing small business participation in our auction program for the immediate future. As a result, all auction winners, including small businesses, will be required to submit the full payment owed on their winning bids shortly after a license is ready to be granted. As we suggested in the Notice, we recognize that in the past the filing of petitions to deny against a winning bidder's application(s) has often had the effect of significantly delaying the grant of the applicant's license(s), and as a result, the deadline for that applicant to submit the balance of its winning bid. However, in the Balanced Budget Act Congress granted the Commission the authority to shorten the

[270] Notice at p 64.

petition to deny period, and as a result, to grant licenses much more rapidly.[271] As an initial matter, consistent with this legislation, we amend Sections 1.2108(b) and (c) of our rules[272] to provide that the Commission shall not grant a license earlier than seven days following issuance of a public notice by the Commission that long-form applications have been accepted for filing. Also consistent with the Balanced Budget Act, we amend this Section to provide that in all cases the period for filing petitions to deny shall be no shorter than five days. In this regard, we seek comment in this Second Further Notice of Proposed Rule Making (see *infra*) on whether there are instances in which the Commission should provide for a longer period for the filing of petitions to deny or for the grant of initial licenses in auctionable services.

99. In light of this change in our rules, we believe that the concerns discussed in the Notice regarding delays in the granting of licenses and, as a result, in the deadline for full payment are substantially reduced. While applications that are the subject of petitions to deny ordinarily take longer to resolve than uncontested applications, we believe these changes in procedure will reduce the risk of frivolous petitions being filed solely for purposes of delay, and will enhance our ability to resolve petitions expeditiously. Finally, we believe that concerns regarding delayed payment are outweighed by the risk

---

[271] Balanced Budget Act,§ 3008. This provision provides as follows:

... [N]o application for an instrument of authorization for frequencies assigned under this title ... shall be granted by the Commission earlier than 7 days following issuance of a public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereto .... [T]he Commission may specify a period (no less than 5 days following issuance of such public notice) for the filing of petitions to deny any application for an instrument of authorization for such frequencies. *Id.*

[272] 47 C.F.R. §§ 1,2108(b), (c)

and uncertainty that would be imposed on an applicant if it were required to make its full auction payment while a petition against its application was still pending and could potentially result in denial of the application. As a result, we decline to amend our rules to require all winning bidders to make their full payments at the same time, regardless of whether petitions to deny their applications have been filed.

4. Default Payments

100. *Background.* Section 1.2104(g) of the Commission's rules[273] provides that when a bidder withdraws, defaults, or is otherwise disqualified from a simultaneous multiple round auction, upfront and/or down payment amounts that the bidder has on deposit with the Commission will be applied first to the bid withdrawal and default payments owed to the Commission.[274] In the past, this rule has been interpreted to

---

[273] 47 C.F.R.§ 1.2104(g).

[274] See 47 C.F.R. ss 1.2104 (g)(2); 1.2106(d),(e); 1.2107(b). Specifically, Section 1.2106(e) states:

(e) In accordance with the provisions of päragraph (d), in the event a penalty is assessed pursuant to § 1.2104 for bid withdrawal or default, upfront payments or down payments on deposit with the Commission will be used to satisfy the bid withdrawal or default penalty before being applied toward any additional payment obligations that the high bidder may have.

Section 1.2106(d), cross-referenced above, states:

(d) The upfront payment(s) of a bidder will be credited toward any down payment required for licenses on which the bidder is the high bidder. Where the upfront payment amount exceeds the required deposit of a winning bidder, the Commission may refund the excess amount after determining that no bid withdrawal penalties are owed by that bidder.

Section 1.2104, also cross-referenced above, at paragraph (g)(2) states:

If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the penalty in subsection (1) plus an additional penalty equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount,

encompass upfront and/or down payment funds a bidder has on deposit for licenses won at the same auction.[275] In the Notice, we proposed to delete the language " simultaneous multiple-round" from Section 1.2104(g) of our rules because we believe that this means of satisfying bid withdrawal or default payments should apply to other auction designs as well as simultaneous multiple-round auctions.[276]

101. *Discussion.* We adopt our proposal to delete the words "simultaneous multiple-round" from Section 1.2104(g), and will apply the default/withdrawal payment procedure to all auction designs. Several commenters support this decision, maintaining that rigorous enforcement of the Commission's payment deadlines is critical to preserving the integrity of the auction and licensing process by ensuring that applicants

---

the 3 percent penalty will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission.

Finally, Section 1.2107(b) refers to applying upfront and down payments to satisfy penalties. See ss 1.2107(b) ("a high bidder must submit to the Commission's lockbox bank such additional funds (the 'down payment') as are necessary to bring its total deposits (not including upfront payments applied to satisfy penalties) up to twenty (20) percent of its high bid(s).... Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable penalties").

[275] Public Notice, "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," DA 96-481 (April 6, 1996); *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2382 p 195. *See also*, CH PCS, Inc, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules, DA 96-1273, 11 FCC Rcd 9343 (rel. August 9, 1996).

[276] Notice at p 67.

possess the necessary financial qualifications.[277] These commenters also suggest that default payments are an effective and necessary method of discouraging defaults and encouraging private market solutions to licensee financing difficulties.[278] We believe that this modification to our general rules governing bidder default will help to maintain the integrity of the auction process by discouraging defaults on the part of bidders, encouraging bidders to make secondary or back- up financial arrangements, and ensuring that default payments are made in a timely manner. We also believe that this modification will help to discourage insincere bidding and ensure that licenses end up in the hands of those parties that value them the most and have the financial qualifications necessary to construct operational systems and provide service.[279]

102. Our rules provide that where a winning bidder defaults on a license, the bidder becomes subject to a default payment equal to the difference between the amount bid and the winning bid the next time the license is offered by the Commission, plus a payment equal to three percent of the subsequent winning bid or the amount bid, whichever is lower.[280] In the Competitive Bidding Fifth Report and Order, the Commission stated that where the default payment cannot be determined, the Commission may assess an initial default payment "of up to 20 percent" of the defaulting bidder's

---

[277] See ISTA Comments at 3; CII Comments at 16-17; Hughes Comments at 8; Airadigm Comments at 14.

[278] *Id.*

[279] See 47 U.S.C.§ 309(j)(5).

[280] See 47 C.F.R.§ 1.2104(g)(2).

winning bid.[281] We adopt our proposal in the Notice to employ this practice for all auctionable services. No commenter addressed this issue. Although the Commission provided that this deposit amount will be up to 20 percent of the defaulted bid amount, we note that if a license is reauctioned for an amount greater than the defaulted bid for the license, the default payment due will be only three percent of the defaulted bid.[282] Thus, in the future we will assess an initial default deposit of between three percent (3%) and twenty percent (20%) of the defaulted bid amount where a winning bidder or licensee defaults and the defaulted license has yet to be reauctioned. Once the license has been reauctioned by the Commission and the total default payment can be determined, the Commission will either assess the balance of the appropriate default payment, or refund any amounts due, as necessary.

5. Installment Payments

a. Late Payments

103. *Background.* Section 1.2110(e)(4)(i) of our rules provides that if an entity paying for its licenses in installments is more than ninety (90) days delinquent in any payment it shall be in default. Section 1.2110(e)(4)(ii) provides that upon default or in anticipation of default on an installment payment, a licensee may request that the Commission grant a three- to

---

[281] See Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5563, n. 51; Public Notice, "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," DA 96-481 (April 6, 1996). *See also* CHPCS, Inc., BTA No. B347, Frequency Block C, Order, DA 96-1825 (rel. November 4, 1996) (assessing an initial default deposit equal to three percent of the total default payment).

[282] 47 C.F.R.§ 24.704(a)(2). *See also* 47 C.F.R.§ 1.2104(g).

six-month grace period, during which no installment payments need be made.[283] This rule states that in considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before; how far into the license term the default occurs; the reasons for default; whether the licensee has met construction build-out requirements; the licensee's financial condition; and whether the licensee is seeking a buyer under an authorized distress sale policy.[284] Under this rule, licensees are required to come before the Commission with a filing as well as financial information such as an income statement or balance sheet, in the case of financial distress, to provide the necessary information for the Commission to make its ruling. As a practical matter, licensees are then required to wait for a ruling by the Commission, or the Bureau on delegated authority, before knowing whether a grace period is granted or denied. In order to simplify these grace period procedures, we proposed to maintain our initial 90-day non-delinquency period, but to provide licensees with a subsequent automatic 90-day grace period in which to make their required payment without being considered in default.

104. We also proposed in the Notice to adopt a late payment fee schedule similar to that employed for the broadband PCS F block auction. Under this system, licensees that are late in their scheduled installment payments are assessed a late payment fee equal to five percent (5%) of the amount of the past due payment.[285] Specifically, we proposed to require that licensees taking advantage of the initial 90-day

---

[283] 47 C.F.R.§ 1.2110(e)(4)(ii).

[284] *Id.*

[285] 47 C.F.R.§ 24.716(c).

non-delinquency period be assessed a late fee of five percent of the late payment, and that licensees taking advantage of the subsequent automatic 90-day grace period be assessed a late fee of 10 percent (10%) of the late payment. We further proposed that the consecutive 90-day non-delinquency and grace periods (e.g., a total of 180 days in which to submit the required payment) be automatic, so that in the future licensees would not be required to file a grace period request and wait for the Commission, or the Bureau on delegated authority, to render a decision.

105. Finally, we proposed in the Notice to modify the method by which interest that accrues is amortized when a licensee fails to make a required installment payment. Section 1.2110(e)(4)(ii) of our rules provides that interest that accrues during a grace period will be amortized over the remaining term of the license.[286] In the Notice, we recognized that amortizing interest in this way has the effect of changing the amount of all future payments and requiring the Commission, or its designee, to generate a new payment schedule for the license. Changing the amount of the installment payment has, in turn, created uncertainty about the interest schedule, and increased the administrative burden on the Commission by requiring formulation of a new amortization schedule.[287] In order to avoid the potential problems associated with changing the amount of installment payments, we proposed to amend Section 1.2110(e)(4)(ii) to require that all current licensees who avail

---

[286] 47 C.F.R.§ 1.2110(e)(4)(ii).

[287] *See also, Second Report and Order* and Further Notice of Proposed Rule Making, which provides for the payment of interest accrued during the period in which installment payments were suspended over eight quarterly payments. *Second Report and Order* and Further Notice of Proposed Rule Making at p 27.

themselves of the automatic grace period pay the required late fee(s), all interest accrued during the non-delinquency period, and the appropriate scheduled payment with the first payment made following the conclusion of the non-delinquency period or grace period.

106. *Discussion.* In order to add certainty to the installment payment process, we adopt our proposals from the Notice to modify our grace period provisions. As discussed above (see Section III.B.5, *supra*), we decline to use installment payments for the immediate future as a means of financing small business participation in our auction program. As a result, our decision with regard to late payment fees for installment payments effectively will apply only to existing licensees who are currently paying for their licenses in installments. From this point forward, instead of considering individual grace period requests, the following system will apply: A licensee who does not make payment on an installment obligation will automatically have an additional 90 days in which to submit its required payment without being considered delinquent, but will be assessed a five percent late payment fee as discussed above. If the licensee fails to make the required payment at the close of this first 90-day non-delinquency period, the licensee will automatically be provided a subsequent 90-day grace period, this time subject to a second, additional late fee equal to ten percent of the initial required payment.

107. As proposed in the Notice, under this system, licensees will not be required to submit a filing to take advantage of these provisions.[288] During this 90-to-180-day

---

[288] We further note that the late fee is to be paid at the time the regular quarterly installment payment is made.

period, the Commission or its designated collection agent will continue to pursue collection of past-due installments and fees.[289] Also during this time, the licensee will have the opportunity to raise necessary capital, continue service and construction efforts, or seek a buyer for its license(s) that will resume payments. These late payment provisions will apply independently to all installment payments. Therefore, the late payment provisions and accompanying late fees will not affect the payment schedule for future payments. Thus, even if a licensee elects to take advantage of the late payment provisions, the licensee will still be responsible for remitting all future installment payments in a timely manner, unless the licensee elects to take advantage of the late payment provisions for any future installment payment. The following example illustrates how this system will operate:

> *ABC Corp. has a $100,000 installment interest payment due on March 1. If ABC Corp. is able to make its payment on March 1, then it must remit $100,000 to the Commission. If ABC Corp. makes its payment anytime from March 2 until May 30 (the end of the non-delinquency period), then ABC Corp. must remit $105,000 to the Commission to be considered current on its March 1 installment payment. If ABC Corp. does not make its March 1 payment by May 30, then it must remit $115,000 on or before August 28. If ABC Corp. does not remit the required $115,000 by August 29 (the end of the 90-day grace period), then it will be considered in default and its license will automatically cancel on August 30 without further*

[289] See Debt Collection Improvement Act, Pub. L. No. 104-134,§ 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C.§ 3711(a).

action by the Commission.[290]

ABC Company's June 1 installment payment of $100,000 remains due on June 1 regardless of the payment status of the March 1 payment. The late payment terms apply to June installment payment independently of the March payment. Thus, if ABC Company does not make its March 1 payment until June 1, the total amount due to the Commission on June 1 is $215,000 which consists of the March payment, the March 5% non-delinquency late fee, the March 10% grace period late fee and the June payment. Assuming the licensee remits the March 1 payment and accompanying March late fees of $115,000 to the Commission by August 29, then the total amount due to the Commission on September 1 will be $215,000 which consists of the June installment payment of $100,000, the June 5% non-delinquency late fee, the June 10% grace period late fee and September installment payment of $100,000.

ABC Company may elect to make late payments and pay the accompanying late fees on the March and June payments. However, ABC Company must remit $115,00 representing the required March payment and accompanying March late fees by August 29 (the end of March's 90-day grace period) or it will be considered in default and its license will automatically cancel on August 30 without further action by the Commission. Furthermore, ABC Company must remit and additional $115,000 representing the required June payment and accompanying June late fees by

[290] See 47 C.F.R.§ 1.2110(e)(4)(iii).

November 29 (the end of June's 90-day grace period) or it will be considered in default and its license will automatically cancel on November 30 without further action by the Commission.

As we proposed in the Notice, the late fees we adopt will accrue on the next business day following the payment due date and will be payable with the next quarterly installment payment obligation. We emphasize that at the close of non-delinquency or grace period, a licensee must submit the required late fee(s), all interest accrued during the non-delinquency period, and the appropriate scheduled payment with the first payment made following the conclusion of the non-delinquency period or grace period. Payments made at the close of any grace period will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement." Afterwards, payments will be applied in the following order: late charges, interest charges, principal payments. As part of our spectrum management responsibilities, we wish to ensure that spectrum is put to use as soon as possible. We also believe that licensees should be working to obtain the funds necessary to meet their payment obligations before they are due and, accordingly, that the non-delinquency and grace periods we adopt should be used only in extraordinary circumstances. Thus, as we emphasized in the Notice, a licensee who fails to make payment within 180 days sufficient to pay the late fees, interest, and principal, will be deemed to have failed to make full payment on its obligation and will be subject to license cancellation pursuant to Section 1.2104(g)(2) of the Commission's rules.

108. Several commenters support our efforts to provide licensees with predetermined non-delinquency periods without

requiring the submission of a formal grace period request.[291] In addition, many of the commenters addressing this issue, including AMTA, Hughes, AirTouch, Mountain Solutions and CII support the imposition of a late payment fee similar to that imposed in the broadband F block auction, in order to create a significant incentive for timely payment of installment obligations.[292] CII believes that modifying our current grace period procedures will provide licensees with knowledge in advance of the extent of any relief that will be forthcoming from the Commission to a licensee who misses an installment payment.[293] AirTouch believes that any licensee who fails to make payment within 180 days should face the automatic cancellation of its license. AirTouch contends that once a certain number of installment payments have been submitted late, the Commission should declare the licensee in default and subject to the default payments proposed in the Notice.[294] In contrast, only CIRI opposes this liberalization of the current grace period rules, requesting instead that grace period relief be made available only when a licensee can demonstrate that such relief is warranted and the public debt will ultimately be satisfied.[295] Although Hughes recommends the imposition of a "significant" late fee to the extent that an applicant misses a payment deadline, Hughes believes that a five to ten percent late fee is large enough to discourage late payments and to

---

[291] See AMTA Comments at 12-13; CII Comments at 16; Pocket Comments at 7-8; Airtouch Comments at 8; Merlin Reply Comments at 4; Airadigm Reply Comments at 2; ISTA Reply Comments at 5-6.

[292] See AMTA Comments at 13; Hughes Comments at 8; AirTouch Comments at 8; Mountain Solutions Comments at 3, CII Comments at 16.

[293] CII Comments at 16.

[294] AirTouch Comments at 8-9.

[295] CIRI Comments at 14 and Reply Comments at 2-3.

ensure that the government is compensated for its administrative expenses in recouping the payment.[296] As an alternative to our proposal in the Notice, GWI proposes that any such late payment fee should be pro-rated over the 90 day payment period instead of accruing all at once regardless of when the late payment is made, in order to provide an economic incentive for licensees who are overdue in their payment obligations to retire the payment quickly instead of waiting until the end of the payment period. In addition, GWI suggests that such a pro-rated payment is fairer to licensees who inadvertently miss a required payment through administrative error or other unavoidable, unforeseen circumstances.[297]

109. As an alternative to our proposals in the Notice, Airadigm contends that following the first 90-day non-delinquency period, licensees should be given a second 90-day period with a five percent late fee, followed by a third 90-day grace period with a 10 percent late fee.[298] ISTA believes that a rule whereby any license is cancelled at the close of the second 90-day grace period is draconian, and that such a "hard-and-fast" automatic cancellation rule would doom many small businesses.[299] GWI opposes the imposition of an additional 10 percent late payment fee where licensees require an additional 90-day late payment period.[300] We decline to adopt these alternate proposals. As we indicated in the Notice, the grant of a grace period is an extraordinary remedy and we wish to encourage licensees to seek private market solutions to their

---

[296] *Id.*

[297] GWI Reply Comments at 8.

[298] Airadigm Reply Comments at 2.

[299] ISTA Reply Comments at 7.

[300] GWI Reply Comments at 9.

capital problems before the payment due date. In this regard, we note that the Commission has an obligation under the Debt Collection Improvement Act ("DCIA") to enforce payment obligations owed to the federal government.[301]

110. We believe that the automatic grace period provisions we adopt today provide licensees with adequate financial incentives to make installment payments on time, while at the same time creating increased certainty that will help licensees pursue private market solutions to their financing difficulties. These provisions also will discourage licensees from attempting to maximize their cash flow at the government's expense by submitting a required installment payment after it is due. Several commenters agree with this assessment.[302] At the same time, these provisions will eliminate uncertainty for many licensees who are seeking to restructure other debt contingent upon the results of the Commission's installment payment provisions. In addition, this system will ease the burden on the Commission of considering individual grace period requests where Commission or its designee may not have the necessary resources to evaluate a licensee's financial condition, business plans, and capital structure proposals. We recognize that some commenters oppose the imposition of a late fee on overdue installment payment,[303] and in particular on the 90-day non-

---

[301] *See* Debt Collection Improvement Act, Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3711(a).

[302] *See, e.g.*, AMTA Comments at 13; Hughes Comments at 8; AirTouch Comments at 8.

[303] ISTA Comments at 1 and Reply Comments at 4-5; IVDS Enterprises Reply Comments at 3; Pocket Comments at 7-8; Merlin Reply Comments at 4.

delinquency period.[304] However, this approach is consistent with the standard commercial practice of establishing late payment fees and developing financial incentives for licensees to resolve capital issues before payment due dates.[305] This approach also is consistent with the provisions of the DCIA, which requires that the Commission notify the Secretary of the Treasury and commence debt collection procedures where a party is more than 180 days past due on any outstanding debt owed to a federal agency.[306]

111. We recognize that a number of commenters oppose the application of these provisions to current licensees.[307] In particular, GWI and IVDS Enterprises argue that to the extent the Commission adopts a late payment fee, it should limit the imposition of such a fee to licenses issued in future auctions.[308] However, our recent experience with the installment payment program has shown the importance of ensuring that all licensees, including current licensees, have adequate financial incentives to make installment payments on time. We also note that in awarding licenses in the past to entities choosing to pay in installments, the Commission has emphasized that the terms of the installment payment program will be governed by current Commission rules and regulations, as amended. For example, in awarding licenses to C block licensees paying for their

---

[304] Airadigm Comments at 14; IVDS Enterprises Reply Comments at 1-2.

[305] *See, e.g.*, Eldon H. Reiley, Guidebook to Security Interests in Personal Property, at § 4.02(iii) (1989).

[306] *See* 31 C.F.R.§ 3711(g)(1).

[307] *See* Mountain Solutions Reply Comments at 5-6; GWI Reply Comments at 7; IVDS Enterprises Reply Comments at 4.

[308] GWI Reply Comments at 7; IVDS Enterprises Reply Comments at 4.

licenses in installments, the Commission indicated in the associated "Note and Security Agreement" that the terms of the installment plan would be governed by and construed in accordance with then-applicable Commission orders and regulations, as amended. We also believe that these licensees should obtain the benefit of increased certainty that provisions for automatic grace periods provide. This decision is supported by Mountain Solutions, who requests that current licensees obtain the benefits of any loosening of the late payment fee and grace period rules.[309]

112. As provided in the *Second Report and Order* and Further Notice of Proposed Rule Making, installment payments for C and F block licensees will resume effective March 31, 1998. Under our decision to reinstate installment payments for these licensees, we provided them with one automatic 60-day non- delinquency period following the March 31, 1998, deadline, during which time they will not be considered delinquent in their payment obligations. As we indicated in the *Second Report and Order* and Further Notice of Proposed Rule Making, we will not entertain any requests for extension of the March 31, 1998 deadline beyond an automatic 60-day non-delinquency period, so that for C and F block licensees all required payments must be submitted no later than May 30, 1998. Only those licensees making a timely payment of all amounts due, as set forth in the *Second Report and Order* will be permitted to take advantage of the late payment provisions we adopt today.[310]

113. In commenting on these modifications to the grace period provisions, CIRI also proposes that the Commission

---

[309] Mountain Solutions Reply Comments at 5-6.

[310] *See* 47 C.F.R. § 1,2110.

make public the terms of any workouts or debt relief provided to licensees.[311] CIRI notes that parties may request confidential treatment of sensitive financial information pursuant to Section 0.459 of the Commission's rules, and that such confidential treatment should be sufficient to safeguard the privacy interests of licensees, while still making the terms of any workout available for public scrutiny.[312] As an initial matter, because we adopt our proposals providing for automatic grace periods, we do not envision licensees filing grace period requests under normal circumstances from this point forward. As a result, we believe that CIRI's concerns about the Commission making public a licensee's request for grace period relief are moot. Moreover, because from this point forward a licensee's taking advantage of our late payment provisions will be an administrative matter processed by the Commission's loan servicer, and not a formal waiver request, aside from instances where a licensee is declared in default, there will be no public notice of a licensee's payment status. The license is cancelled automatically under such circumstances. In contrast, for licensees who have previously filed grace period requests consistent with our current rules and procedures, we will continue our current practice of making the request public when a decision is released granting or denying the request, except to the extent that any request by the licensee for confidential treatment is granted pursuant to Section 0.459 of the Commission's rules.[313] We further clarify that such licensees

---

[311] CIRI Reply Comments at 3.

[312] *Id.* at 4.

[313] *See* 47 C.F.R.§ 0.459. We note that several PCS C and F block licensees have filed requests for an extension of the deadline for making payments with the Bureau pursuant to 47 C.F.R.§ 1.2110(e)(4)(ii). In addition, two parties have filed requests for the restructuring of installment payment schedules, and several parties have filed requests for annual, as opposed to quarterly payment schedules. These requests will be addressed separately by the Bureau in a manner consistent with the procedures we have outlined.

are not deemed to be in default on these licenses until such time as the Bureau issues a decision on these grace period requests. Licensees whose requests for a grace period are denied will have ten (10) business days to make the required payment or be considered in default.

b. Defaults on Installment Payments

114. *Background.* In the Notice, we tentatively concluded that licensees that default on installment payment obligations should be subject to the default payment provisions outlined in Section 1.2104(g) (i.e., the difference between the defaulting winner's bid and the subsequent winning bid plus 3 percent of the lesser of these amounts). Sections 1.2110(e)(1) and 1.2110(e)(2) of our rules provide that applicants eligible for installment payments will be liable for such a payment if they fail to remit either their initial or final down payment.[314] Section 1.2110(e)(4)(iii) provides that (1) following the expiration of any grace period without successful resumption of payment, (2) upon denial of a grace period request, or (3) upon default with no such request submitted, the license of an entity paying on an installment basis will be cancelled automatically and the Commission will initiate debt collection procedures pursuant to Federal Claims Collection Standards and applicable laws.[315] This section of our rules does not clearly indicate, however, whether under these circumstances the licensee will be liable for the default payment set forth in Section 1.2104(g).

---

[314] 47 C.F.R. §§ 1.1220(e)(i) and 1.2110(e)(2).

[315] 47 C.F.R.§ 1.2110(e)(4)(iii); *see* 47 C.F.R. Part I, Subpart O, 4 C.F.R. Parts 101-105, and 31 U.§.C.§§ 3701 et seq.

115. *Discussion.* We do not adopt our tentative conclusion to apply the default provisions of Section 1.2104(g) to licensees who default on an installment payment. Most commenters addressing the issue oppose this proposal.[316] For example, Pocket submits that default payments assessed later in the license term become highly arbitrary and unduly burdensome. Pocket also contends that such payments are greater than those traditionally required for secured creditors and create substantial disincentives for investors and creditors who might otherwise be interested in providing financing for licensees.[317] Pocket also notes that any default payment assessed disadvantages a licensee's other creditors, which also makes it more difficult for licensees to raise capital.[318] Finally, Pocket states that default payments assessed later in the license term have no deterrent effect as there is no basis to believe that licensees that have paid substantial sums to the Treasury will willingly default.[319] In contrast, AirTouch supports our tentative conclusion that licensees that ultimately fail to fulfill their installment payment obligations despite the availability of a 90-day non- delinquency period and a subsequent, automatic 90-day grace period, should be declared in default, and in turn be made subject to the default payments proposed in the Notice.[320]

116. We have considered the comments of those who oppose the proposed assessment, and find that an additional

---

[316] *See, e.g.*, Airadigm Comments at 16; Pocket Comments at 9.

[317] Pocket Comments at 9.

[318] *Id.*

[319] Pocket Comments at 10.

[320] AirTouch Comments at 8-9.

payment requirement for licensees defaulting on installments is not necessary to achieve our stated objectives. Our current rules and installment payment terms are adequate to discourage defaults and encourage licensees to find private market solutions when they face financial difficulties. We also believe that the rules we adopt today providing for a 90-day non-delinquency period followed by a subsequent, automatic 90-day grace period, subject to appropriate late fees of five percent for the 90-day non-delinquency period and 10% for automatic 90-day grace period, payable at the conclusion of these periods serve these goals without substantially risking delays or disruption in service to the public. In particular, we believe that this certainty regarding the Commission's treatment of licensees needing extra time to make their installment payments will increase the likelihood that licensees and potential investors will find solutions to capital problems before a default occurs. The risk of losing its license should provide a licensee a strong incentive to avoid default. If, however, a default does occur, the conditions on the face of each license and the terms of the notes and security agreements executed by licensees provide the Commission appropriate remedies that will ensure that defaulted licenses are returned to the Commission for reauction and that all outstanding debts, as well as the Commission's costs, are recoverable.

c. Cross Default in the Context of Installment Payments

117. *Background.* As we indicated in the Notice, a number of parties have asked that we address the issue of cross default in the context of installment payments.[321] The

---

[321] *See, e.g.*, Letter to Michele C. Farquhar from Jay P. Urwitz, August 2, 1996.

Commission's rules currently provide that in the event of default, any default payment assessed will be deducted from any upfront payments or down payments a defaulting bidder has deposited with the Commission.[322] The Commission has pursued a policy of cross default for defaults on down payments.[323] A cross default provision would specify that if a licensee defaults on one installment payment loan, it would also default on any other installment payment loans it holds. These provisions are standard in credit-related agreements.[324] We sought comment on whether the Commission should apply cross defaults to its installment payment plan loans. We also asked whether to apply a cross default provision across services. We asked, for example, whether the Commission should consider pursuing default remedies against all PCS and SMR licenses when a licensee with both SMR and broadband PCS licenses defaults on one of its PCS licenses. Alternatively, we asked whether we should pursue default remedies against the single license only. We also asked whether specific factors should influence our decision to pursue cross-defaults and whether cross defaults should be applied automatically or on a case-by-case basis. Finally, we sought comment in general on what remedies are appropriate when licensees default on installment payments.

118. In response to the Installment Payment Public Notice,

---

[322] 47 C.F.R.§ 1.2104(g)(2).

[323] *See* "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," Public Notice, 11 FCC Rcd 10853 (1996). *See also* Letter to Kenneth Hobbs from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, DA 97-260 (rel. February 4, 1997)

[324] *See* Stephen R. Kruft, Cross Default Provisions in Financing and Derivatives Transactions, 113 Banking L.J. 216 (1996).

the Commission received extensive comment on the issue of cross default in the context of defaults on installment payments. Several commenters urged the Commission not to adopt a cross default provision.[325] In addition, some commenters urged the Commission to allow licensees to distribute their licenses among independent entities as a means of insulating against cross default.[326] Such a decision, they contend, would allow potential financiers to invest in specific markets that meet their investment criteria without fear that a default in other markets would threaten their investment.[327] Furthermore, some commenters specifically requested that the Commission clarify its rules regarding cross default in the context of defaults on installment payments if licenses are held by licensees with the same or overlapping control groups.[328]

119. In the *Second Report and Order* in this docket, we concluded that we would not pursue cross default remedies against C block licensees who default on installment payments with regard to other licenses in the C or F blocks.[329] We stated that our decision was warranted in light of our efforts to

---

[325] *See e.g.*, BIA Capital Comments at 4; AmeriCall ex parte letter, July 11, 1997; Magnacom ex parte letter, August 13, 1997.

[326] *See, e.g.*, ClearComm Reply Comments at 4.

[327] *Id.*

[328] *See, e.g.*, ClearComm Reply Comments at 4; BIA Capital Comments at 4.

[329] *See* Second Report and Order at pp 79-80. We explained, for example, that if a licensee defaults on a C block license and that licensee holds other C block licenses on which it is making its payments, we will not declare it to be in default on its debt associated with the other C block licenses. Similarly, if a licensee defaults on a C block license, and also holds F block licenses on which it is making its payments, we will not declare it to be in default on its F block debt.

provide current C block licensees who are experiencing financing difficulties with options for meeting their financial obligations to the Commission. We deferred until completion of the Part 1 Rule Making our decision on whether to amend more comprehensively our policy of cross defaults. We also emphasized that existing installment payment default rules and license conditions would continue to apply for any C block licensees found to be in default after the March 31, 1998, date for resumption of C block installment payments.

120. *Discussion.* After consideration of the comments in the proceeding, we conclude that we will not pursue a policy of cross default (either within or across services) where licensees default on an installment payment. Because we eliminate the use of installment payments as a means of financing small business participation in our auction program for the foreseeable future (see Section III.B.5, *supra*), we note that in practice this decision will apply only to existing licensees who are currently paying for their licenses in installments.

121. Our decision not to pursue cross default remedies against current licensees who default on an installment payment is supported by the majority of commenters.[330] For example, Airadigm contends that it is unfair to jeopardize an entire business because of a default on one license.[331] Similarly, ISTA argues for separate treatment of separate services, regardless of ownership, lest a failure in one business cause failure in unrelated businesses.[332] IVDS Enterprises proposes that

---

[330] *See, e.g.*, Airadigm Comments at 16; Reply Comments at 5; Pocket Comments at 11, Merlin Reply Comments at 6-7; NPCS Reply Comments at 8; ISTA Reply Comments at 8; GWI Reply Comments at 4.

[331] Airadigm Comments at 16.

[332] ISTA Reply Comments at 8.

licensees be able to discontinue installment payments on a particular license and allow that license to be cancelled or revoked.[333] IVDS Enterprises believes that such a decision should not affect the licensee's other licenses, whether in the same or other services, where the licensee has made timely installment payments.[334] Alternatively, Pocket believes that the Commission should reserve the authority to impose cross defaults on a case-by-case basis only for licensees that have demonstrated bad faith.[335]

122. We recognize that some commenters strongly advocate a policy of cross defaults in this context. These commenters suggest that such a policy (1) prevents speculation during the auction and cherry-picking (e.g., selectively defaulting on some licenses while keeping others) after the auction concludes,[336] (2) encourages auction participants to find private market solutions to financial shortfalls,[337] and (3) is consistent with commercial lending policies.[338] We believe, however, that the default provisions contained in Section 1.2104(g)(2) serve as an adequate incentive to discourage speculation and encourage licensees to pursue non-default solutions to financial difficulties. We also emphasize that our decision on this matter only addresses default in the context of installment payments, and does not affect our policy with

---

[333] IVDS Enterprises Reply Comments at 4.

[334] IVDS Enterprises Reply Comments at 4-5.

[335] Pocket Comments at 12-13.

[336] CIRI Comments at 15-16.

[337] PCIA Comments at 7, AirTouch Comments at 9.

[338] Airtouch Comments at 9.

regard to defaults on down payments.[339] In addition, by making licensees who default on an installment payment subject to the default payment set forth in Section 1.2104(g)(2), we create an additional deterrent to licensees considering default as a solution to financing shortfalls. We believe that this policy will promote the goals of Section 309(j) by not punishing otherwise successful licensees for failures in one market, and will strike an appropriate balance between our conflicting roles as both "lender" and "regulator."[340] Accordingly, upon default on an installment payment, a license will automatically cancel without further action by the Commission, the licensee will become subject to the default payment set forth in Section 1.2104(g) of our rules (see Section III.D.5, *supra*), and the Commission will initiate debt collection procedures against the licensee and accountable affiliates.[341]

E. Competitive Bidding Design, Procedure, and Timing Issues

1. Balanced Budget Act of 1997 Notice and Comment Procedures

123. *Background.* The Balanced Budget Act of 1997 provides that "before the issuance of bidding rules" the Commission must provide adequate time for parties to comment on proposed auction procedures, and that "after the issuance of bidding rules," the Commission must provide

---

[339] *See* Section III.D.b, *supra*. *See also* BDPCS, Inc. Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, Memorandum Opinion and Order, 12 FCC Rcd 3230 (1997).

[340] *See Report to Congress* at 39.

[341] 47 C.F.R.§§ 1.2104(g), 1.2110(e)(4)(iii). *See also* 31 U.S.C. Chapter 37; 4 C.F.R. Parts 101-105; 47 C.F.R. Part 1, Subpart O.

adequate time "to ensure that interested parties have sufficient time to develop business plans, assess market conditions, and evaluate availability of equipment."[342] In previous auctions, it has been our practice to permit the Bureau, on delegated authority, to address a variety of issues related to the conduct of the auction and to announce these issues by public notice subsequent to the adoption of service-specific auction rules.[343] This practice has proven workable and efficient, and has enabled the Commission, through the involvement of the Bureau, to respond rapidly to a variety of day-to-day operational concerns associated with the conduct of each auction.

124. *Discussion.* We believe that in the past our service-specific rule making process has served the purpose of adequately ensuring that interested parties have sufficient time to familiarize themselves with the rules and procedures to be employed in an auction prior to the application deadlines and start date of that auction. We nevertheless believe that this legislation requires that we provide an additional opportunity for input from potential bidders prior to the issuance of detailed auction-specific information by the Bureau. To date, the Bureau has served as the primary point of contact with potential bidders and other parties interested in issues relating to each

---

[342] Balanced Budget Act of 1997,§ 3002(a)(1)(B)(iv)

[343] *See, e.g.*, "Auction of 800 MHz Specialized Mobile Radio Service Licenses," Public Notice, DA 97-1672 (rel. August 6, 1997) ("800 MHZ SMR Pre- Auction Public Notice); "Auction of Local Multipoint Distribution Service Licenses," Public Notice, DA 97-2081(rel. September 25, 1997) ("LMDS Pre- Auction Public Notice").

upcoming auction, and this has worked well.[344] In light of the typically time-sensitive nature of most issues arising in the weeks prior to the start of an auction, the Bureau has been equipped to make determinations and respond rapidly to potential bidders' concerns.[345] Consistent with the provisions of the Balanced Budget Act, and to ensure that potential bidders have adequate time to familiarize themselves with the specific provisions that will govern the day-to-day conduct of an auction, we direct the Bureau, under its existing delegated authority,[346] to seek comment on a variety of auction-specific issues prior to the start of each auction.[347]

---

[344] For example, the Bureau has traditionally released a public notice announcing the licenses to be auctioned, the start date of the auction, relevant filing deadlines (*e.g.*, the short-form application (FCC Form 175) filing deadline and the deadline for submission of upfront payments) and dates for pre-auction events (*e.g.*, the auction seminar and mock auction). *See, e.g.*, "FCC Announces Upcoming Spectrum Auction Schedule; Two Auctions To Commence Before End of the Year," Public Notice, DA 97-1627 (rel. July 30, 1997).

[345] *See, e.g.*, Letter to Mr. John Prawat, DigiVox Telecom, Inc. from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, Federal Communications Commission, DA 97-730 (rel. April 11, 1997) (addressing DigiVox's Request for Rule Waiver of the Upfront Payment Requirement in the WCS Auction); Letter to Linda Feldmann, Esq., Leventhal, Senter & Lerman, from Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, DA 97-2261 (rel. October 24, 1997) (addressing the request of Castle Tower Corporation (PR) for waiver of the Commission's Rules to correct its application to reflect its status as non-small business applicant in the 800 MHz SMR auction).

[346] *See* 47 C.F.R.§§ 0.131(c), 0.331, 0.332.

[347] We note that the Bureau has recently begun this process by seeking comment on issues relating to the 800 MHz and LMDS auctions, both of which we announced prior to the passage of the Balanced Budget Act. *See* "Comment Sought on Balanced Budget Provisions Calling For Reserve

125. We direct the Bureau to seek comment on specific mechanisms relating to day-to-day auction conduct including, for example, the structure of bidding rounds and stages, establishment of minimum opening bids or reserve prices,[348] minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension, or cancellation. We direct the Bureau to afford interested parties a reasonable time, in light of the start date of each auction and relevant pre-auction filing deadlines, to comment on auction-specific issues. In this regard, we note that it has been the Bureau's practice to release the public notice providing details concerning each upcoming auction sufficiently in advance of the short-form filing deadline (e.g., 30 days prior to the deadline) to provide interested parties with an opportunity to develop business plans, assess market conditions and evaluate the availability of equipment. Also consistent with our previous practice, we recognize that the Bureau needs the flexibility to announce, at any time in the weeks leading up to the start date of each auction, any minor, non-substantive amendments or clarifications to the specific mechanisms set forth in auction-related public notices or the Bidder Information Package. We believe that this process is consistent with the requirements of Section 3002(a)(1)(B)(iv) of the Balanced Budget Act, and will afford potential bidders

---

Prices or Minimum Opening Bids in FCC Auctions," Public Notice, DA 97-1933 (rel. September 5, 1997) (800 MHz SMR), and "Comment Sought on Reserve Prices or Minimum Opening Bids for LMDS Auction," Public Notice, DA 97-2224 (rel. October 17, 1997) (LMDS).

[348] *See* Section III.E.4, *infra*.

adequate notice, as well as an opportunity to comment on the Bureau's intentions regarding issues relating to the day-to-day conduct of each auction.

2. "Real time" Bidding

126. *Background.* Congress has directed the Commission to "design and test multiple alternative methodologies for auction designs."[349] In the Order accompanying the Notice, we amended our general auction rules to specify a menu from which the Commission may choose an auction design.[350] These designs include: (1) simultaneous multiple-round auctions, using remote and/or on-site electronic bidding; (2) sequential multiple-round auctions, using either oral ascending or remote and/or on-site electronic bidding; and (3) sequential or simultaneous single-round auctions, using either remote or on-site electronic bidding, or sealed bids. The simultaneous multiple-round auction methodology with discrete rounds has been used in most auctions thus far because it provides bidders with information regarding the value others place on licenses and allows bidders to pursue backup strategies as more information becomes available during the auction.

127. As we indicated in the Notice, the Commission is always interested in exploring new ways to reduce the length of each auction without sacrificing the economic efficiency of the competitive bidding process.[351] We sought comment on how we could speed our auctions, and in particular, our simultaneous multiple-round auctions. For example, we sought

---

[349] 47 U.S.C.§ 309(j)(3).

[350] *See* Competitive Bidding Second Report and Order, 9 FCC Rcd at 2373- 2374, pp 146-153.

[351] *Notice* at p 79.

comment on how we could modify our current procedural rules for simultaneous multiple-round auctions to meet this objective, or what new designs we might use to efficiently allocate numerous licenses.[352] Among other options, we proposed to modify our current simultaneous multiple-round auction rules to allow for "real time" bidding -- a system in which bidding occurs on an open and continuous basis within each bidding period -- as another design feature for electronic multiple-round auctions.[353] This is in contrast to the current discrete bidding periods currently used in the simultaneous multiple round auction where bidders cannot see or react to the bids of other bidders until the close of each bidding period. In addition, we sought comment on the appropriate length for the real time bidding rounds and on what measures we can take to assure bidders that they will have enough time to determine their bidding strategies with "real time" bidding. Finally, we sought comment on the impact of "real time" bidding on small businesses, generally, and in particular on their ability to process bid information during the course of a single round.

128. *Discussion.* We adopt our proposal in the Notice to allow for "real time" bidding as an alternate design methodology in our rules. After careful consideration of the comments received in this proceeding, as well as our experience in conducting 15 auctions to date, we conclude that "real time" bidding will allow auctions to proceed more rapidly because it will allow bidders immediate feedback on new high bids. We also note that in an effort to simplify the auction process and prevent "gaming" of bids, the Commission has recently modified its electronic bidding process by

---

[352] *Id.* at ¶ 80.

[353] *Id.* at ¶¶ 81-84.

implementing "click-box bidding."[354] This feature, which replaces the field where bidders previously typed their dollar bid amount with a "click on check box to bid" field (where the only bid amount allowed is at the minimum acceptable bid) no longer allows bidders to type a bid amount on the Bid Submission screen. As such, "click-box bidding" can work well in a "real-time" bidding context because bidders can more rapidly respond to the bids of other bidders, permitting an auction to progress more rapidly and efficiently. The Commission has successfully employed click box bidding in the recently completed 800 MHz SMR auction,[355] and plans to employ it in the forthcoming LMDS auction.[356]

129. The Commission delegates to the Bureau the authority to determine whether the public interest will be served by "real time" bidding in a particular auction. Most commenters oppose the use of "real time" bidding, arguing it may be difficult for bidders to react quickly enough to ensure that in each bidding round they make new high bids on the necessary percentage of their bidding eligibility to meet their activity requirement.[357] These commenters also believe that the

---

[354] *See, e.g.*, Applications of Mercury PCS II, LLC For Facilities in the Broadband Personal Communications Systems in the D, E and F Blocks, Notice of Apparent Liability for Forfeiture, FCC 97-388 (rel. October 28, 1997) ("Mercury NALF").

[355] *See* "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," Public Notice, DA 97-1934 (rel. September 5, 1997).

[356] *See* LMDS Pre-Auction Public Notice.

[357] *See* Nextel Comments at 3-4 and Reply Comments at 5-6; AT&T Comments at 5; ACE Comments at 16; AMTA Comments at 13-14; NPCS Reply Comments at 8-9; CellNet Reply Comments at 6; NextWave Reply Comments at 7. *See* Competitive Bidding Second Report and Order, 9 FCC Rcd 2371, pp 133-37 (1994), for an explanation and description of the

somewhat accelerated pace of "real time" bidding may leave less time to craft informed bidding strategies during the auction.[358]

130. As mentioned above, the "click-box bidding" format should significantly improve a bidder's ability to reach quickly. Further, should we determine to employ "real-time" bidding in the future, we believe that the issues involving meeting activity requirements will be alleviated by our proposal in the Notice to open a discrete closed bidding period after each fixed period of "real time" bidding (when only standing high bids from the previous round and new high bids from the current round count in determining the bidder's activity level). During this closed bidding period, bidders will be able to submit valid bids (bids that meet or exceed the minimum accepted bid) to ensure that they have the opportunity to meet their activity requirements for the round. Following the discrete closed bidding period, the Commission will post the final round results for the period and make all bids available to the public. This discrete period should help to eliminate any risks of not meeting eligibility requirements or having time to formulate bidding strategies which commenters suggest may be associated with "real time" electronic bidding.[359] In particular, this period will help to provide bidders sufficient time to meet eligibility requirements

---

Commission's activity rules.

[358] *See* Nextel Comments at 3-4 and Reply Comments at 5-6; AT&T Comments at 5; ACE Comments at 16; AMTA Comments at 13-14; NPCS Reply Comments at 8-9; CellNet Reply Comments at 6; NextWave Reply Comments at 7.

[359] *See* Nextel Comments at 3-4 and Reply Comments at 5-6; AT&T Comments at 5; ACE Comments at 16; AMTA Comments at 13-15; NextWave Reply Comments at 6-7; NPCS Reply Comments at 8-9; CellNet Reply Comments at 6.

and will minimize the risks, suggested by some commenters, of the submission of erroneous bids.[360]

131. One of the greatest advantages to "real time" bidding is that allows bidders to obtain immediate feedback on new high bids, withdrawn high bids and minimum accepted bids, and thereby provides them with the opportunity to immediately respond to this information and move licenses toward their final valuations more quickly. We believe that, particularly in the case of complex auctions of multiple licenses, it is one means of helping auctions to progress more efficiently. Under the current simultaneous multiple-round auction rules, each round of bidding contains a discrete bidding period during which bidders cannot see the actions of other bidders. Bidders must wait until the end of each round to see the bids placed by other bidders and determine their status as high bidder. In contrast, an open, continuous bidding round -- in which bidders know when their bid has been exceeded and are free to bid again -- can be used to reduce the delay inherent in the current design where a bidder must wait until the next discrete round to react to the actions of other bidders.

132. We note that some commenters express concern that the widespread use of "real time" bidding would increase the administrative costs of participating in the auction due to the incentive to stay on-line during the continuous bidding period and thereby work to exclude smaller entities that may lack the resources to devote to a concentrated bidding period or to stay on-line during the entire bidding period.[361] We agree with

---

[360] *See* Nextel Comments at 3; CII Comments at 17; NextWave Reply Comments at 7.

[361] Nextel Comments at 3; AMTA Comments at 13-14; NextWave Reply Comments at 6-7; CellNet Reply Comments at 6.

commenters that under some circumstances the costs of participating in an auction in which bidders are required to be "on-line" may discourage the participation of small businesses. We therefore conclude that the per minute charge for bidding "on- line" should be reexamined, and delegate to the Bureau that authority to implement such a reduced fee in the future, if appropriate.[362]

133. No commenters addressed our tentative conclusion in that Notice that because "real time" auctions are a variation of the simultaneous multiple-round auction design established in our rules, many of the same procedures (i.e., upfront payments to determine eligibility, activity requirements that apply to each round, minimum bid increments, and a stopping rule) should apply.[363] These procedures have proven workable and easily understood by bidders in the context of our simultaneous multiple-round auction design, but some modifications to these procedures may be necessary if we employ "real time" bidding. We conclude that the Bureau should undertake this task.

134. Consistent with the Balanced Budget Act,[364] we direct the Bureau (see Section III.E.1, *supra*) to seek comment from

---

[362] The Commission adopted a fee schedule for obtaining access to the Commission's database and remote bidding software packages. The remote bidding software package is available for $175. The current charge for on-line remote access via a 900 number is $2.30 per minute. *See* Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, On-Line Communications Services Charges, and Bidders Information Packages in Connection with Auctionable Services, WT Docket No. 95-69, Report and Order, FCC 95-308 (rel. July 21, 1995).

[363] Competitive Bidding Second Report and Order, 9 FCC Rcd at 2367-68, pp 116-21 (1994). *See also* Competitive Bidding Fifth Report and Order, 9 FCC Rcd 5532, pp 24-26.

[364] *See* Balanced Budget Act, § 3002.

the public on auction- specific issues (i.e., duration of bidding rounds and activity requirements) prior to the start of each auction. We believe that this practice of seeking comment on such issues prior to the start of each auction will adequately address any additional concerns associated with the use of "real time" bidding. We also note that we seek, on an ongoing basis, to enhance and improve our bidding processes. We believe that the Bureau should explore "real time" bidding consistent with the requirement under Section 309(j) that we experiment with different bidding methodologies.[365]

3. Combinatorial Bidding

135. *Background*. Combinatorial bidding, also known as package bidding, allows bidders to place single bids for groups of licenses. For example, in a combinatorial auction, bidder A could place a bid of $100,000 for licenses 1, 2 and 4, while bidder B places a bid of $500,000 for licenses 2, 3 and 5. The bidding software then calculates the revenue maximizing solution and awards the high bids for that round to the appropriate package(s). Three commenters discussed the possible use of combinatorial bidding as a method of speeding the auction process by providing for the efficient aggregation of licenses. Specifically, the Automated Credit Exchange ("ACE") strongly supports the use of combinatorial bidding, stating that such a system can increase the speed of particular auctions and provide for the deployment of spectrum resources in the most efficient license configurations.[366] In contrast, Merlin argues that combinatorial bidding is too complex and difficult to implement, and suggests that such a system would disadvantage smaller entities interested in bidding for smaller

[365] *See* 47 U.S.C. § 309(j)(3).

[366] ACE Comments at 1-15.

areas or niche markets.[367] Finally, AirTouch contends that combinatorial bidding should not be used in auctions of encumbered spectrum because incumbents do not undertake the same system/license acquisition planning strategy as bidders in auctions for unencumbered spectrum.[368]

136. *Discussion*. We did not specifically seek comment in the Notice on the use of combinatorial bidding as an auction design methodology. Our current Part 1 rules already provide for the use of combinatorial bidding as one of our competitive bidding design options.[369] In addition, the Commission was directed by Congress in the Balanced Budget Act of 1997 to consider the use of combinatorial bidding as an alternative auction design that could be used, in certain instances, as a means of speeding the auction process.[370] Specifically, the Balanced Budget Act requires the Commission, for testing purposes, to design and conduct an auction in which a system of combinatorial bidding is used.[371]

137. We have insufficient information to determine how this relatively new bidding methodology might be used to improve our spectrum auction program. The Commission will seek comment on a number of issues relating to combinatorial bidding, and will more thoroughly address this issue once the record is complete. The Commission has also awarded a research and development contract to a private sector consultant to examine theoretical and applied combinatorial bidding

[367] Merlin Reply Comments at 8.

[368] AirTouch Reply Comments at 8.

[369] See 47 C.F.R. § 1.2103(b).

[370] Balanced Budget Act.

[371] Balanced Budget Act; 47 U.S.C. § 309(j)(3)(i).

approaches where licenses exhibit strong synergies and bidders have overlapping preferences (i.e., prefer different packages of licenses). The contractor will also evaluate the most appropriate of the theoretical and applied approaches to combinatorial bidding for spectrum auctions and address a number of concerns raised by the Commission and other interested parties. Our goal in awarding the contract is to allow private sector and government auction experts to address these concerns and investigate the possible effects of the use of combinatorial bidding on the auction process, including the Commission's fulfillment of the objectives of Section 309(j) of the Communications Act.

4. Minimum Opening Bids and Reserve Prices

138. *Background.* Section 1.2104(d) of our rules states that the Commission may establish suggested minimum opening bids.[372] In the Notice, we proposed to amend Section 1.2104 to specify that the Commission may establish minimum opening bids, rather than suggested minimum opening bids.[373] Such a provision has been adopted in service-specific rules.[374] In the Notice, we indicated that a minimum opening bid can serve some of the same purposes as a reservation price by preventing a license from being awarded under circumstances where there would be little competition among bidders and significant incentives to collude.[375] In addition, we noted that establishing a minimum opening bid is one way of helping to

[372] 47 C.F.R. § 1.2104(d) (emphasis added).

[373] *Notice* at ¶ 86.

[374] *See, e.g.* 47 C.F.R. § 101.71 (DBS).

[375] *Notice* at ¶ 86. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2384, ¶ 207.

speed the auction process, and thus the provision of service to the public.[376] After the release of the Notice, Congress passed the Balanced Budget Act of 1997, which directed the Commission to prescribe methods by which a reasonable reserve price will be required or a minimum opening bid will be established, unless the Commission determines that a reserve price or a minimum opening bid are not in the public interest.[377]

139. *Discussion.* Several commenters oppose the use of minimum opening bids.[378] However, the Balanced Budget Act establishes a presumption in favor of a required minimum opening bid or reserve price.[379] We therefore adopt our proposal in the Notice to delete the term "suggested" from Section 1.2104(d). We also clarify that the Bureau has the authority to seek comment on minimum opening bids and reserve prices and to establish such mechanisms for each auction, consistent with its role in managing the auction process and setting valuations for other purposes (e.g., setting upfront payment amounts). The Bureau shall establish a minimum opening bid and/or reserve price for each auction, unless, after comment is sought prior to a particular auction, it is determined that a minimum opening bid or reserve price would not be in

[376] *Id.*

[377] Balanced Budget Act; 47 U.S.C. § 309(j)(4)(F).

[378] *See* AirTouch Comments at 10; PageNet Comments at 12; Nextel Comments at 7 and Reply Comments at 6; CII Comments at 18; ISTA Comments at 3; Hughes Comments at 9-10; Airadigm Comments at 17; AMTA Comments at 15; CellNet Reply Comments at 7.

[379] Section 3002(a)(1)(C)(iii) of the Balanced Budget Act provides that the Commission must "prescribe methods by which a reasonable reserve price will be required, or a minimum opening bid will be established, to obtain any license or permit being assigned ... unless ... such a reserve price or minimum opening bid is not in the public interest." Balanced Budget Act,§ 3002(a)(1)(C)(iii).

the public interest.

140. The terms "minimum opening bid" and "reserve price" are traditionally different, and are employed for different purposes. A reserve price is defined as an absolute minimum price below which an auctioneer will not sell an object being auctioned. It may be disclosed to bidders before an auction or during an auction, or it may be kept secret, so that a "winning" bidder does not actually find out if the object has been won until after the auction has closed. Auctioneers generally employ reserve prices to order to maximize the revenue earned from an auction.[380] A minimum bid is a minimum value below which bids will not be accepted in the first round of an auction. The level of a minimum opening bid is not unchangeable like a reserve price, but may be reduced at the discretion of the auctioneer if no bids are made at the existing level. The primary purpose of a minimum opening bid is to speed up the course of an auction. However, a minimum bid also can serve a revenue-enhancing function like a reserve price, because if bids will not be accepted below a certain level, they will also not be sold below that level. That is, a minimum opening bid effectively functions as a reserve price unless or until it is reduced. Regarding the level of reserves or minimum bids, we do not believe that the Balanced Budget Act provision means that we should now be attempting to maximize the revenue earned in all future spectrum license auctions. The other auction goals in the Act, such as ensuring the deployment and rapid deployment of new technologies and services and

[380] Auction theory shows that the reserve price device accomplishes its revenue maximization goal because it gives all bidders an incentive to increase the level of their bids above what they would be in the absence of a reserve.

promoting economic opportunity and competition,[381] have not been eliminated, and we must continue to balance and pursue them all. Therefore, we conclude that the new provision does not call for traditional reserve prices. Rather, it calls for an added protection that licenses will not be assigned at unacceptably low prices.

141. We believe that the Bureau should have the discretion to employ either or both of these mechanisms for future auctions.[382] We direct the Bureau to seek comment on the use of a minimum opening bid and/or reserve price, as it will do for a variety of auction-specific issues,[383] prior to each auction. In addition, the Bureau should seek comment on the methodology to be employed in establishing each of these mechanisms. Among other factors, the Bureau should consider the amount of spectrum being auctioned, levels of incumbency, the availability of technology to provide service, the size of the geographic service areas, issues of interference with other spectrum bands, and any other relevant factors that could reasonably have an impact on valuation of the spectrum being auctioned.

5. Maximum Bid Increments

142. *Background.* A bid increment is the amount or percentage by which a bid must be raised above the high bid of the previous round in order to be accepted as a valid bid in the

[381] *See* 47 U.S.C. s 309(j)(3).

[382] We note that our Part I rules already provide that the Commission may provide for a suggested minimum opening bid and may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded. *See* 47 C.F.R.§§ 1.2104(c), (d).

[383] *See* Section II, *supra*.

current round. In the *Competitive Bidding Second Report and Order*, we determined that the Commission would reserve the right to specify minimum bid increments in dollar terms as well as in percentage terms.[384] We reasoned that imposing a minimum bid increment speeds the progress of the auction and, in combination with activity and stopping rules, helps to ensure that the auction comes to a close within a reasonable period of time.[385] We did not reserve the discretion to specify maximum bid increments. In the Notice, we therefore sought comment on whether the Commission should retain the discretion to employ a maximum bid increment if it finds that jump bidding (i.e., placing bids that are significantly higher than the minimum acceptable bid) is impairing the auction process.[386]

143. *Discussion*. Several commenters suggest that jump bidding is not a problem of serious concern.[387] Some theoretical literature, however, suggests that bidders could use jump bidding to manipulate the auction process and potentially reduce efficiency of the auction.[388] For example, a general principle of auction theory is that the auction mechanisms that perform the best are those which are able to induce bidders to reveal the most information. To the extent that jump bids

---

[384]Competitive Bidding Second Report and Order, 9 FCC Rcd at 2369, pp 124-26.

[385]*Id.*

[386] Notice at p 88.

[387]*See* AirTouch Comments at 11, Reply Comments at 5; PageNet Comments at 12-13; NextWave Reply Comments at 8.

[388] *See* Lawrence M. Ausubel, "Open-Outcry Auctions for FCC Licenses," Comments for MCI Telecommunications Corp in IB Docket No. 95-168, PP Docket No. 93-253 (Nov. 17, 1995) (citing Christopher Avery, "Strategic Jump Bidding in English Auctions," Working Paper, Kennedy School of Government, Harvard University, March 15, 1994).

enable bidders to conceal information, the phenomenon moves us away from the informational advantages of an ascending bid (multiple round) auction in the direction of a first-price sealed bid (single round) auction. As ISTA recognizes, jump bidding can complicate bidding strategy and deny bidders information about the number of bidders who would be willing to pay prices between the minimum acceptable bid and the jump bid.[389] In the absence of information about the bidders who would be willing to participate at intermediate bids, other bidders may feel compelled to shade their bids more than they would otherwise. This behavior is an attempt to avoid the "winner's curse," that is, the tendency for the winner to be the bidder who most overestimates the value of the item being auctioned.

144. As an initial matter, we note that recent changes designed to improve the Commission's electronic auction bidding process eliminate the dangers that a maximum bid increment is designed to avoid (e.g., jump bidding).[390] In an effort to speed the auction process and eliminate unwarranted "gaming" of our processes, the Commission has simplified the electronic auction bidding process by implementing "click box bidding".[391] As discussed above (see Section III.E.2, *supra*), this feature permits bidders to enter a bid only at the maximum bid increment as determined by the Commission, and thus makes bidding tactics such as jump bidding impossible. Nevertheless, we will reserve the discretion to employ a maximum bid increment should we return to an auction format in which jump bidding can in any way decrease the

---

[389] ISTA Comments at 3.

[390] *See, e.g.*, "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," Public Notice, DA 97-1934 (rel. September 5, 1997).

[391]*See* Mercury NALF.

competitiveness of an auction. In this regard, we disagree with NextWave's suggestion that by disallowing jump bids as one method by which bidders may obtain information about each other the Commission risks prolonging an auction.[392] On the contrary, the Commission has alternate methods (e.g., "click-box bidding", employing minimum bid increments and activity rules and increasing the number of rounds per day) to ensure that auctions close within a reasonable time.

6. Bid Withdrawal Payments

145. *Background.* Under our current rules, if a high bid is withdrawn prior to the close of a simultaneous multiple-round auction, the Commission will impose a bid withdrawal payment equal to the difference between the withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid. If a winning bidder defaults after the close of an auction, the defaulting bidder will be required to pay the foregoing payment plus an additional payment of 3 percent of the subsequent winning bid or its own withdrawn bid, whichever is lower.[393]

146. We adopted these bid withdrawal rules in the *Competitive Bidding Second Report and Order* and determined that they would discourage insincere bidding without causing bidders to be too cautious in attempting to aggregate licenses.[394] However, in the Atlanta Trunking Order, we held that in some cases of erroneous bids, full application of the bid withdrawal

---

[392] NextWave Reply Comments at 8.

[393] 47 C.F.R. § 1.2104(g).

[394] *See* Competitive Bidding Second Report and Order, 9 FCC Rcd at 2373- 74, pp 146-153.

payment provisions could impose an extreme and unnecessary hardship on bidders and that some relief appears necessary.[395] We also noted that it may be extremely difficult for the Commission to distinguish between " honest" erroneous bids and "strategic" bids that appear erroneous. We therefore fashioned guidelines in the Atlanta Trunking Order to provide for reduced bid withdrawal payments in cases of erroneous bids that balance issues of fairness to bidders with the importance of discouraging insincere bidding. We later modified the broadband PCS rules for the D, E, and F blocks to establish similar provisions governing the withdrawal of erroneous bids.[396] In the Notice, we proposed to amend Sections 1.2104 and 1.2109 of our rules to establish similar provisions to apply to all future auctions.[397]

147. *Discussion.* As discussed above (see Section III.E.2, *supra*), we recently implemented "click box bidding" in an effort to improve the auction process and eliminate erroneous bids. We also have recently modified the electronic bidding

---

[395] *See* Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions, Order, 11 FCC Rcd 17189, FCC 96-203 (May 3, 1996) ("Atlanta Trunking Order") and Georgia Independent PCS Corporation Request to Waive Bid Withdrawal Payment Provision, Order, DA 96-706 11 FCC Rcd 13728 (May 6, 1996). *See also* Atlanta Trunking Associates, Inc. and MAP Wireless, L.L.C., Petition for Reconsideration of Bid Withdrawal Payment and Georgia Independent PCS Corp., Application for Review of Request to Waive Bid Withdrawal Payment Provision, Memorandum Opinion and Order, FCC 97-154, 12 FCC Rcd 6382 (rel. May 6, 1997) (waiving the full bid withdrawal payments assessed against these parties after a finding that the Commission's remote bidding system may have contributed to some confusion leading to the submission of the erroneous bids).

[396] D. E. and F Block Report and Order, 11 FCC Rcd at 7896, pp 152-54.

[397] *See* Notice at p 92.

format to limit withdrawals. As a result of such changes, the types of erroneous bids discussed in the Notice cannot occur under our new bidding format. We therefore conclude that our proposal regarding decreased bid withdrawal payments in cases of erroneous bids is moot.

7. Misuse of Bid Withdrawals

148. *Background.* As we indicated in the Notice, in prior auctions we have found that allowing bid withdrawals risks encouraging insincere bidding and the use of withdrawals for anti-competitive strategic purposes, such as signaling other bidders.[398] We therefore sought comment on whether we should exercise our authority to limit withdrawals, and if so, under what circumstances.[399] Finally, we sought comment on other ways to address the concern about strategic withdrawals without unduly affecting bidders' ability to efficiently aggregate licenses, such as increasing the withdrawal payment or changing its structure.[400]

149. *Discussion.* Several commenters oppose the Commission's proposal to place limits on bid withdrawals in certain circumstances as a means of avoiding strategic withdrawals that are intended for anti-competitive purposes.[401] Both AT&T and Merlin argue that the ability to withdraw bids

---

[398] *See* Notice at p 90. *See also* Competitive Bidding Second Report and Order, 9 FCC Rcd at 2373-74, pp 146-153; Mercury NALF.

[399] *Notice* at ¶ 93.

[400] *Id.*

[401] *See* AT&T Comments at 5-6; PageNet Comments at 13-14; AirTouch Comments at 11; Merlin Reply Comments at 5-6.

is critical to a bidder's auction strategy.[402] While they recognize the difficulty in determining the true intent behind a withdrawn bid, these commenters suggest that the Commission continue to monitor each auction carefully, and address abusive behavior on a case-by-case basis.[403] Similarly, PageNet states that the Commission should not limit bid withdrawals as they are critical to providing applicants with the flexibility to correct bids that are placed in error and to quickly change bidding strategy.[404] PageNet contends that concerns about strategic withdrawals intended to produce anti-competitive results are not sufficient to eliminate the bidding flexibility that bid withdrawals provide.[405] Finally, AirTouch suggests that the Commission permit bid withdrawals at any time, subject to certain conditions.[406] In particular, AirTouch recommends that: (1) all bid withdrawals should be subject to applicable bid withdrawal payments; (2) a bidder withdrawing a bid should not be permitted to regain eligibility on any bidding units lost as a result of the withdrawal; and (3) the high bidder in the round prior to the withdrawn bid should be permitted to bid again on the license, and to reacquire eligibility for bidding units necessary to resubmit the new bid.[407]

150. In contrast, NextWave supports a limitation on bid withdrawals. NextWave states that bid withdrawals are a necessary tool, but in some instances, bid withdrawals are used

---

[402] AT&T Comments at 5-6; Merlin Reply Comments at 5-6.

[403] AT&T Comments at 5-6; Merlin Reply Comments at 5-6.

[404] PageNet Comments at 13-14.

[405] PageNet Comments at 14.

[406] AirTouch Comments at 11.

[407] AirTouch Comments at 12.

for nsincere bidding designed to " game" the auction.[408] To protect against such misuse, NextWave proposes, for example, that the Commission create a fourth stage of the auction, during which a bidder who has withdrawn from a particular market would be prohibited from re-bidding in the same market.[409] In the past, we have recognized that allowing bid withdrawals facilitates efficient aggregation of licenses and pursuit of efficient backup strategies as information becomes available during the course of an auction. Nevertheless, we also have recognized that bidders may, in some instances, seek to remove bids for improper purposes, such as to delay the close of the auction for strategic purposes. For this reason, the Bureau has traditionally retained the discretion to limit withdrawals as part of the management of an auction.[410] To prevent strategic delays to the close of the auction, or other abuses, the Bureau should exercise its discretion assertively. In addition, the Bureau should consider limiting the number of rounds in which bidders may withdraw bids,[411] and to prevent bidders from bidding on a particular market if the Bureau finds that a bidder is abusing the Commission's bid withdrawal procedures. These are among the types of issues on which the Bureau will seek comment prior to the start of each future auction.[412]

---

[408] NextWave Reply Comments at 9.

[409] *Id.*

[410] *See, e.g.*, "Auction of Broadband Personal Communications Services D, E and F Blocks -- Auction Notice and Filing Requirements," Public Notice, DA 96-1026 (rel. June 26, 1996).

[411] This practice was employed in the recently-completed 800 MHz SMR auction, and will be employed in the upcoming LMDS auction. *See* "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," Public Notice, DA 97-1934 (rel. September 5, 1997); LMDS Pre-Auction Public Notice.

[412] *See* Section I.A., *supra*.

8. Reauction Versus Offering to Second Highest Bidder

151. *Background.* Under Section 1.2109(b) of the Commission's rules,[413] if a winning bidder withdraws its bid after the auction has closed or fails to remit the required down payment within ten business days after the Commission has issued a Public Notice announcing winning bidders, the bidder will have defaulted. In such event, Section 1.2109(b) provides that the Commission may, in its discretion, either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids.[414] In the Notice, we requested comment on whether we should (1) retain Section 1.2109(b) in its current form; (2) modify the rule so that the Commission retains the discretion regardless of when a default occurs to offer the license only to the second highest bidder at its bid price; (3) modify the rule so that the Commission retains discretion to offer a license on which the winning bidder has defaulted on its down payment obligation only to the second highest bidder; (4) modify the rule so that the Commission retains discretion to offer a defaulted license to the highest losing bidders (in descending order of their bids), but only at the final bid level of the second highest bidder; or (5) modify the rule to require reauction of defaulted licenses regardless of when a default occurs.[415] In addition, we sought comment on whether we should modify Section 1.2109(b) to codify our statement in the Competitive Bidding Fifth Report

---

[413] 47 C.F.R. § 1.2109(b).

[414] 47 C.F.R.§ 1.2109(b). If a winning bidder defaults on a license or is disqualified after having made the required down payment, the Commission will conduct another auction for the license, affording new parties an opportunity to file applications. *Id.*

[415] *Notice*at ¶ 97.

and Order[416] that where there are a relatively small number of low value licenses, and only a short time has passed since the initial auction, the Commission may choose to offer the license to the second highest bidder because the cost of conducting another auction may exceed the benefits. Finally, we requested that commenters favoring this option indicate the parameters that the Commission should employ in determining which licenses might be re-offered to bidders in the original aution.[417]

152. *Discussion*. We will modify Section 1.2109(b) to reserve the discretion to either reauction a defaulted license or offer it to the other highest bidders (in descending order) at their final bids.[418] Several commenters support the reauction of defaulted licenses because it helps to ensure that the price paid for a license is the current price, rather than the price that was applicable at the time the original auction occurred.[419] Only two commenters oppose reauction in all circumstances.[420] Airadigm and AMTA oppose providing the Commission with the discretion to reauction defaulted licenses because they believe that awarding licenses to the next highest bidder will be faster than reauctioning.[421] However, as we stated in the Notice, we have developed a computerized auction system and

---

[416] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5537, n.55.

[417] *See Notice* at ¶ 97.

[418] 47 C.F.R.§ 1.2109(b). If a winning bidder defaults on a license or is disqualified after having made the required down payment, the Commission will conduct another auction for the license, affording new parties an opportunity to file applications. *Id.*

[419] Nextel Comments at 8-9 and Reply Comments at 7.

[420] AMTA Comments at 15-16; Airadigm Comments at 16-17.

[421] Airadigm Comments at 16-17; AMTA Comments at 15-16.

conducted numerous auctions and we now believe that the costs of a reauction, even for a small number of relatively low value licenses, is generally minimal.[422] We also believe that the planned use of regularly scheduled quarterly auctions will ensure rapid reauction.[423]

153. Further, we note that re-offering a defaulted license to the next highest bidder (in descending order) at their final bids may not ensure that the license will be awarded to the bidder who values it the most highly. In particular, as the license is offered to bidders at the next highest bids, other parties can argue that they would pay more for the license if given the opportunity. In addition, when more than one license is being auctioned, aggregation strategies may shift during the course of the auction, affecting the value placed on any individual license by a particular bidder. As we discussed in the Notice, when we first adopted rules governing the licensing of defaulted licenses, we stated that "[i]n the event that a winning bidder in a simultaneous multiple-round auction defaults on its down payment obligations, the Commission will generally reauction the license either to existing or new applicants."[424] Noting that in some circumstances the costs of conducting a reauction may not always be justified, we reserved the discretion in cases in which the winning bidder defaults on its down payment obligation to offer a defaulted license to the highest losing bidders (in descending order of their bids) at their final bids if "only a small number of relatively low value

---

[422] *See* Notice at p 96.

[423] *See* Notice at p 7 (providing for regularly scheduled quarterly auctions).

[424] *Notice* at ¶ 95, citing *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2374, ¶ 154 n.115.

licenses are to be reauctioned ...."[425]

154. Nextel and others suggest that the Commission should retain the discretion to award defaulted licenses to the next highest bidder only when the default occurs soon after the close of the auction and there has been no opportunity for parties to file petitions to deny.[426] Nextel suggests that in such an instance, there is little risk of a significant change in market price, and no risk of encouraging frivolous petitions to deny.[427] We are aware of the dangers of adopting a rule which could have the unfortunate consequence of encouraging the filing of frivolous petitions to deny. Nevertheless, we believe that by reserving the discretion to either reauction defaulted licenses or award them to the next highest bidder, the Commission will be in the best possible position to determine which option serves the public interest in each particular situation.

F. Anti-Collusion Rules

155. *Background.* In the *Competitive Bidding Second Report and Order* the Commission adopted rules designed to prevent and facilitate the detection of collusive conduct in order to enhance and ensure the competitiveness of both the auction process and the post-auction market structure.[428] Section 1.2105(c) of the Commission's rules requires that auction applicants identify on their short-form applications any parties with whom they have entered into any consortium

---

[425] *Id.*

[426] Nextel Reply Comments at 7.

[427] *Id.*

[428] Competitive Bidding Second Report and Order, 9 FCC Rcd at 2385-2386, pp 221-226. *See also* 47 C.F.R.§ 1.2105(c).

arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the competitive bidding process.[429] Applicants are also required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bids, bidding strategies, or the particular markets on which they will or will not bid.[430] After short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders that have applied to bid in the same geographic license area, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.[431] In addition, winning bidders are required to attach as an exhibit to their long-form application a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they have entered into relating to the competitive bidding process prior to the close of bidding.[432] All such arrangements must have been finalized prior to the filing of short-form applications.[433]

---

[429] 47 C.F.R.§ 1.2105(c)(1). *See also* Competitive Bidding Second Report and Order, 9 FCC Rcd at 2387, p 225.

[430] 47 C.F.R.§ 1.2105(a)(2)(ix).

[431] 47 C.F.R.§ 1.2105(c); Fourth Memorandum Opinion and Order in PP Docket No. 93-253, 9 FCC Rcd 6858, 6868 (1994); Competitive Bidding Second Report and Order, 9 FCC Rcd at 2387, p 225.

[432] 47 C.F.R.§ 1.2107(d).

[433] *See* 47 C.F.R.§ 1.2105(c)(1).

156. Under Section 1.2105(c)(4) of our rules, a party holding a non- controlling, attributable interest in one applicant may acquire an ownership interest, form a consortium with, or enter into a joint bidding arrangement with other applicants for the same geographic license area, provided that (1) the attributable interest holder certifies that it has not and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, has formed a consortium, or has entered into a joint bidding arrangement; and (2) the arrangements do not result in a change in control of any of the applicants.[434] In the Notice, we recognized that this exception, although helpful in facilitating the flow of capital to multiple applicants, is difficult to apply in a business setting.[435] In particular, we stated that entities are reluctant to invest in multiple applicants if they cannot obtain information about business plans and strategies, which often necessarily reflect bidding strategies or bids. We therefore proposed to modify this provision to permit entities to invest in multiple applicants, subject to certain conditions, if the original applicant withdraws from the auction.[436]

157. In the rule making proceeding adopting service-specific auction rules for paging services, several commenters suggested that discussions between bidders for the same license area regarding a business merger or acquisition may be construed as discussions of bidding or bidding strategy, and

---

[434] 47 C.F.R.§ 1.2105(c)(4).

[435] Notice at p 100.

[436] *Id.* at p 101.

thus a violation of Section 1.2105(c)(4).[437] These commenters requested that the Commission create a "safe harbor" for discussions of certain non-auction related business matters between applicants for the same license areas to minimize any chilling effect on ongoing business acquisitions and transactions.[438] At that time, we stated that we did not believe a sufficient record had been established to enable us to make a decision on this proposal, and that we would more thoroughly examine this issue in our review of our general auction procedures.[439] In the Notice, we therefore sought comment on creation of such a "safe harbor," in light of efforts by the Commission and its staff to clarify the relationship between the anti-collusion rule and non-auction related business negotiations occurring during the time the anti-collusion rule applies to parties participating in an auction.[440] We also sought comment in the Notice on any other changes to our rules prohibiting collusion that commenters believe are warranted.[441] Finally, we sought comment on the public notices and letters issued by Commission staff interpreting and clarifying these rules.[442]

158. *Discussion.* We have taken this opportunity in

---

[437] *See* AirTouch Comments at 37-40 and Arch Comments at 19-20, Paging Second Report and Order and Further Notice of Proposed Rule Making. *See also* MobileMedia Comments at 26 and Metrocall Comments at 21-22 filed in the same proceeding.

[438] *Id.*

[439] *Paging Second Report and Order and Further Notice of Proposed Rule Making* at ¶ 156.

[440] *Notice* at ¶ 102.

[441] *Notice* at ¶ 102.

[442] *Id.*

revisiting our general competitive bidding procedures to examine the effectiveness of the anti- collusion rule in the 15 auctions we have conducted to date. We continue to believe that our anti-collusion rules are necessary to deter bidders from engaging in anti-competitive behavior. Nevertheless, after careful review of the comments received in this proceeding, we have determined that some modifications to Section 1.2105(c) can be made which will benefit bidders in several respects, without jeopardizing the competitiveness and overall integrity of our auction program.

159. In the Collusion MO&O,[443] the Commission revisited the anti- collusion rules prior to the start of the PCS auctions, and concluded that allowing holders of non-controlling attributable interests in an applicant greater flexibility to form agreements with other applicants would help applicants to acquire the additional capital necessary to bid successfully for licenses. We therefore created an exception to the general rule contained in Section 1.2105 to permit a holder of a non-controlling attributable interest in one applicant for a particular license or licenses to obtain ownership interests in or enter into consortium arrangements with a second applicant for a license in the same geographic service area.[444] The attributable interest holder must certify to the Commission that it has observed and will observe certain restrictions on communication concerning the applicants in which it holds an attributable interest or with

---

[443] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, WT Docket No. 93-253, Memorandum Opinion and Order, 9 FCC Rcd 7684 (1994) at 7687-89, pp 8-12 (1994) ("Collusion MO&O").

[444] For purposes of this rule, an "attributable" investor is one holding five percent or more of the applicant. *See* 47 C.F.R.§ 1.2105(c)(4).

which it has entered into a bidding arrangement.[445]

160. After considering the comments filed in response to our proposals in the Notice, we have decided to adopt a second exception to our general rules prohibiting collusion.[446] Specifically, we will permit a holder of a non- controlling attributable interest in an applicant to obtain an ownership interest in or enter into a consortium arrangement with another applicant for a license in the same geographic area provided that the original applicant has withdrawn from the auction, is no longer placing bids, and has no further eligibility. To meet the requirements of this exception, the attributable interest holder will be required to certify to the Commission that it did not communicate with the new applicant prior to the date the original applicant withdrew from the auction, and that it will not convey bidding information, or otherwise serve as a nexus between the previous applicant and the new applicant. As stated in the Notice, this additional exception will further facilitate the flow of capital to auction applicants by encouraging, and providing the flexibility necessary for, non-controlling investors to invest in other auction applicants if their original applicant fails to complete the auction.[447] The majority of commenters addressing this proposal agree that it will encourage investment in auction applicants without threatening the overall competitiveness of the auction process.[448]

---

[445] *Id. See also* Collusion MO&O, 9 FCC Rcd at 7688-89, p 11.

[446] *See* 47 C.F.R.§ 1.2105(c).

[447] *Id.*

[448] *See* Airadigm Comments at 17 and Reply Comments at 7; AT&T Comments at 7; CII Comments at 20; ISTA Comments at 3.

161. Only Nextel and PageNet oppose this exception, citing the potential for collusive activity when an investor in an applicant that has chosen to withdraw from the auction explores possible investments in other applicants, thus learning bidding strategies of multiple auction participants.[449] In addition, PageNet contends that this exception could encourage speculation which would threaten the integrity of the auction process and ultimately result in lower prices paid for the spectrum.[450] However, after balancing these factors, we believe that the benefits of this certification requirement, in particular the likelihood that auction applicants will be able to attract increased investment, exceed any possible disadvantages. The Commission requires that auction applicants certify to the truthfulness and accuracy of a number of issues on their Form 175 applications, and to make minor amendments when necessary. We believe that applicants are no more likely to make false certifications about the exception which we adopt today than about other information on the form. As discussed *infra*, we also remind prospective applicants that the Commission will conduct a detailed investigation in the event it becomes aware of a possible violation of the anti-collusion rule, and that violations may result in the loss of the down payment or full bid amount, the cancellation of licenses, and preclusion from participation in future auctions.

162. Commenters in both the Paging proceeding and in this proceeding[451] support the creation of a safe harbor for

---

[449] *See* Nextel Comments at 9-10 and Reply Comments at 8; PageNet Comments at 15.

[450] PageNet Comments at 15.

[451] *See* Metrocall Comments at 4; AT&T Comments at 7; PCIA Comments at 5-6; AMTA Comments at 16; PageNet Comments at 14; AirTouch Comments at 12-13, Reply Comments at 7; CII Comments at 19-

discussions of certain non-auction related business matters between applicants for the same license areas. In general, these commenters argue that (1) the Commission's anti- collusion rules cause unnecessary confusion in their current form,[452] (2) the purposes of the anti-collusion rules would not be threatened by such a safe harbor,[453] and (3) existing antitrust laws and policies will adequately accomplish the goal of protecting the competitiveness of the bidding process.[454] As our auction program has evolved, we have continued to refine and clarify for bidders the operation and impact of the anti-collusion rule upon bidder conduct during the course of an auction.[455] Prior to the start of the broadband PCS D, E and F block auction, the Bureau received numerous inquiries concerning the impact of these rules upon business contacts between current broadband PCS licensees and auction winners and eligible participants in

---

20; ISTA Comments at 3; Nextel Reply Comments at 3-4; CellNet Reply Comments at 5.

[452] AT&T Comments at 6-7.

[453] *See* Metrocall Comments at 4; AT&T Comments at 7.

[454] AT&T Comments at 6-7.

[455] *See* Public Notice, "Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rules for D, E and F Block Bidders," DA 96-1460 (August 28, 1996) ("August 28 Public Notice"); Public Notice, "FCC Staff Clarifies Application of Anti-Collusion Rule to Broadband PCS 'C' Block Reauction," DA 96-929 (June 10, 1996) ("June 10 Public Notice"); Public Notice, "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti- Collusion Rules, DA 95-2244 (Oct. 26, 1995); News Release, "Staff Adopts Order and Releases Letters Clarifying Issues on Broadband PCS Auctions" (Oct. 26, 1994); Letter from William E. Kennard, FCC, to Gary M. Epstein & James H. Barker, Oct. 25, 1994; Letter from Rosalind K. Allen, FCC, to R. Michael Senkowski, Dec. 1, 1994; Letter from Rosalind K. Allen, FCC, to Leonard J. Kennedy, Dec. 14, 1994; Letter from Kathleen O'Brien Ham, FCC, to Mark Grady, Apr. 16, 1996; Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96-1566, Sept. 17, 1996.

the ongoing broadband PCS D, E and F Block auction. In response to these inquiries, the Bureau released a Public Notice providing guidance on these business negotiations in the context of our anti-collusion rules.[456] The Bureau emphasized that Section 1.2105(c) may affect the way in which auction applicants conduct their routine business during an auction by placing significant limitations upon their ability to pursue business opportunities involving services in the geographic areas for which they have applied to bid for licenses.[457] These interpretations have provided sufficient guidance concerning the types of non-auction related communications which are permitted under Section 1.2105(c), and we therefore decline to create such a safe harbor.

163. We affirm the Bureau's interpretation of this aspect of the anti- collusion rule. As a general matter, the anti-collusion rule does not prohibit non auction-related business negotiations between auction applicants who have applied for the same geographic service areas. We caution auction applicants, however, that discussions concerning, but not limited to, issues such as management, resale, roaming, interconnection, partitioning and disaggregation may all raise impermissible subject matter for discussion because they may convey pricing information and bidding strategy.[458] Because auction applicants should avoid all discussions with each other that will likely affect bids or bidding strategies, we believe that individual applicants, and not the Commission, are in the best position to determine in the first instance which

---

[456] *June 10 Public Notice.*

[457] *Id.* at 2.

[458] *See* Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96- 1566, Sept. 17, 1996, at 1-2.

communications are permissible and which are not.[459]

164. As discussed above, the Notice also invited comment on any other changes to our rules prohibiting collusion that commenters believe are warranted.[460] Section 1.2105(c)(6)(i) of our rules provides that, for purposes of the anti-collusion rule, an applicant is defined as an entity submitting a short-form application, as well as all holders of partnership, ownership, and any stock interest amounting to five percent or more of the entity.[461] One commenter, the Coalition of Institutional Investors ("CII"), states that defining any holder of five percent or more of an auction applicant as part of the applicant for purposes of the Commission's anti- collusion rules unnecessarily restricts applicants' abilities to obtain financing from a variety of sources.[462] After careful consideration of the issue, we agree with CII. Therefore, we will increase the attribution standard contained in Section 1.2105(c)(6)(i) to 10 percent, or any holder of a controlling interest in the applicant.[463]

165. A higher attribution standard will facilitate the flow of capital to applicants by enabling parties to make investments in multiple applicants, including applicants for licenses in the same geographic areas. Our decision to use an attribution threshold of 10 percent is consistent with the change we make to our general reporting requirement (see Section III.C.3, *supra*). We recognize that some potential for collusion exists

---

[459] *See August 28 Public Notice.*

[460] *Notice* at ¶ 102.

[461] 47 C.F.R. § 1.2105(c)(6)(i).

[462] CII Comments at 18-19.

[463] *See* 47 C.F.R. § 1,2105(c)(6)(i).

whenever an entity is permitted to hold an interest in more than one applicant for licenses in the same geographic service area. However, we reemphasize that auction applicants and their owners continue to be subject to existing antitrust laws, and that conduct that is permissible under the Commission's rules may be prohibited by the antitrust statute.[464] In addition, we remind prospective auction participants that we will continue to scrutinize carefully any instances in which bidding patterns suggest that collusion may be occurring.

166. Finally, we reemphasize that the Commission will aggressively investigate any allegations that an auction participant has violated Section 1.2105(c).[465] Bidders who are found to have violated the Commission's anti-collusion rules may, among other sanctions, be subject to the loss of their down payment or their full bid amount, face the cancellation of their licenses, and may be prohibited from participating in future auctions.[466]In addition, where allegations appear to give rise to violations of the federal antitrust laws, the Commission may

---

[464] *See Collusion MO&O*, 9 FCC Rcd at 7684, ¶ 12.

[465] *See* Competitive Bidding Second Report and Order, 9 FCC Rcd at 2388, p 226. *See also* August 28 Public Notice at 3-4.

[466] *See* Commercial Realty St. Pete, Notice of Apparent Liability for Forfeiture, FCC 95-58, 10 FCC Rcd 4277 (1995) (assessing two $10,000 forfeitures for violations of the Commission's anti-collusion rules during the IVDS auction); Application of Mercury PCS II, L.L.C. for Authority to Construct and Operate Broadband PCS Systems on Frequency Blocks D, E, and F, Memorandum Opinion and Order, DA 97-1782 (rel. August 21, 1997) (conditioning the final grant of an applicant's licenses on any action that may be taken based on the outcome of any investigation conducted by the Commission or the Department of Justice regarding bid signaling or other bidding activity); Mercury NALF (assessing a $650,000 forfeiture for an apparent violation of Section 1.2105(c) by placing trailing numbers at the end of its bids to disclose its bidding strategy in a reflexive manner that invited collusive behavior).

investigate and/or refer such cases to the United States Department of Justice for investigation.[467]

G. Pre-grant Construction

167. *Background.* Section 22.143 of the Commission's rules permits auction winners in the Public Mobile Services to begin construction of facilities prior to the grant of their applications, at their own risk and subject to certain exceptions, 35 days after the date of the public notice listing the application for that facility as acceptable for filing.[468] In the Notice, we proposed to extend similar pre-grant construction rules to all auction winners, regardless of whether petitions to deny have been filed against their long-form applications.[469] We further proposed to permit each auction winner to begin construction of its system, at its own risk, upon release of a public notice announcing that their post-auction long-form applications were accepted for filing. We tentatively concluded that to do so would further the public interest by expediting, in most cases, the initiation of service to the public.[470]

168. *Discussion.* We will adopt our proposal in the Notice to permit applicants for all licenses awarded by competitive bidding to begin construction of facilities prior to the grant of their applications. All commenters addressing the issue support our proposal to permit license applicants to begin construction of their facilities, at their own risk, upon release of a public notice announcing the acceptance for filing of post-auction

---

[467] *Id.*

[468] *See* 47 C.F.R. § 22.143.

[469] *Notice* at ¶ 104.

[470] *Id.*

long-form applications.[471] These commenters agree that allowing pre-grant construction furthers the statutory objective of rapidly deploying new technologies, products, and services for the benefit of the public.[472]

169. Commenters also support our proposal to permit license applicants with petitions to deny filed against their long-form applications to begin construction of their facilities at the same time as license applicants whose licenses are not the subject of pending petitions to deny.[473] While our current service-specific rules require as a condition for pre-grant construction no pending petitions to deny,[474] we conclude that the merits of petitions to deny may be judged by an applicant and factored into its assessment of the risk of proceeding with construction before license grant.[475] We therefore adopt a pre-grant construction rule for all services subject to competitive bidding that permits construction by applicants that are subject to petitions to deny. Of course, pre-grant construction will be subject to any service-related restrictions, including but not limited to antenna restrictions, environmental requirements, and international coordination. Any applicant engaging in pre-grant construction activity does so entirely at its own risk, and the Commission will not take such activity into account in ruling

---

[471] *See* PCIA Comments at 6; PageNet Comments at 16, AMTA Comments at 17; CTIA Comments at 1; AirTouch Comments at 13 and Reply Comments at 6; Airadigm Comments at 18; NextWave Reply Comments at 9-10.

[472] 47 U.S.C.§ 309(j)(3)(A).

[473] *See* CTIA Comments at 1; CTIA Comments at 1; AirTouch Comments at 13, Reply Comments at 6; NextWave Reply Comments at 9-10.

[474] *See, e.g.*, 47 C.F.R.§ 22.143(d)(1).

[475] *See, e.g.*, PCIA Comments at 6.

on any petition to deny. Finally, we note that we expect our licensing process to be more rapid generally in light of the shortened petition to deny period permitted by the Balanced Budget Act.[476]

IV. SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

A. Rules Governing Designated Entities

1. Designated Entities

170. *Background.* Section 309(j)(4)(D) of the Communications Act provides that in prescribing rules for a competitive bidding system, the Commission shall "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." The statute further provides that for this purpose, the Commission shall consider the use of tax certificates, bidding credits and other procedures. In addition, pursuant to Section 309(j)(4)(A), the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods," in order to "disseminat[e] licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[477] Pursuant to these mandates, the Commission has adopted a number of measures, including entrepreneur blocks, bidding credits, reduced upfront

---

[476] Balanced Budget Act,§ 3008.

[477] 47 C.F.R.§§ 309(j)(3)(B) and (j)(4)(A).

payments/down payments and installment payments.[478]

171. In addition, Section 257 of the Telecommunications Act requires the Commission to identify and eliminate market entry barriers for small and entrepreneurial telecommunications businesses. We are committed to completing a study to examine barriers encountered by minorities and women in the auctions process and in the secondary market for licenses.[479] We have initiated this process with regard to the study on secondary markets, and will initiate the auctions study expeditiously. We will release the results in 1998.

172. Any measures that we decide to adopt that give special preferences specifically to minority- and women-owned businesses must comply with recent Supreme Court decisions, as discussed below. To that end, we seek comment on (1) whether there is a compelling governmental interest that would justify the use of preferences for minority-owned businesses and "exceedingly persuasive justification" for preferences for women-owned businesses; (2) what evidence supports the commenter's position on the issue; and (3) what measures, if any, could be narrowly tailored to withstand judicial review. The specific issues that commenters should address are discussed in more detail below.

---

[478] *See* generally The FCC Report to Congress on Spectrum Auctions, FCC 97-353 (rel. Oct. 9, 1997). Congress repealed, as of January 17, 1995, that portion of section 1071 of the Internal Revenue Code, 26 U.S.C.§ 1071, under which the Commission administered the tax certificate program. *See* Self- Employed Health Insurance Act, H.R. 831,§ 2(d).

[479] *See* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, Report, 12 FCC Rcd 16802 (1997) ("Section 257 Report").

173. *Discussion*

a. Minority-based designated entity provisions

174. As we have recognized in the past, in Adarand Constructors, Inc. v. Pena, the Supreme Court established that governmental policies that take race into account are reviewed under a strict (as opposed to intermediate) scrutiny standard.[480] We tentatively conclude that, to the extent consistent with constitutional standards, we should take steps to further our statutory mandate to ensure that minorities have the opportunity to engage in the provision of spectrum services pursuant to Section 309(j)(4). We seek comment on how we can modify our designated entity provisions, consistent with the standards set forth in Adarand. In particular, we seek comment on what tools, such as bidding credits, might be used consistent with

---

[480] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) ("Adarand"). *See* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, Notice of Inquiry, 11 FCC Rcd 6280, 6309-15 (1996); Section 257 Report, 12 FCC Rcd 16802, 16927-30. The Commission also has sought comment on post-Adarand provisions for minority- and women-owned businesses in a number of service- specific rule making proceedings. *See, e.g.*, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93- 253, Amendment of the Commission's Cellular PCS Cross-Ownership Rule, GN Docket No. 90-314, Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Further Notice of Proposed Rule Making, 10 FCC Rcd 1872, 1877-79 (1995); *See also* Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 220-222 MHz, PP Docket No. 93-252, Second Memorandum Opinion and Order and Third Notice of Proposed Rule Making, 11 FCC Rcd 188, 266-67 (1995).

Adarand. In addition, we seek comment on whether we should limit any tools designed to ensure that minority-owned businesses have the chance to take part in our auction program to those minority-owned businesses that also qualify as small businesses. Commenters advocating the adoption of such measures should address the constitutional issue and present specific empirical evidence supporting their views.

175. Should we determine that provisions for minorities would withstand strict scrutiny as required by Adarand, we also seek comment on appropriate eligibility standards for applicants seeking to qualify for minority-based provisions. For example, we could specify that to qualify for any minority- based provisions, an applicant must be minority-controlled (i.e., minorities must have de facto as well as de jure control of the applicant and must own more than 50 percent of the equity on a fully diluted basis) and meet the eligibility requirements set forth in 47 C.F.R. § 1.2110(b)(2).[481] Alternatively, to ensure that any minority policies are reserved for businesses in which minorities have a substantial financial stake, as well as de jure and de facto control, we could strictly define equity to require that minorities have the right to receive at least 50.1 percent of the annual distribution of any dividends paid on the voting stock and the right to receive dividends, profits, and other

[481] Section 1.2110(b)(2) requires that minority owners must have a controlling interest in the applicant, must own on a fully diluted basis 50.1 percent of the equity, and in the case of corporate applicants, must hold at least 50.1 percent of the voting stock or, in the case of partnerships, all general partners must be minorities (or entities 100 percent owned or controlled by minorities), and minorities must collectively own at least 50.1 percent of the partnership equity. As discussed above, we also note that the Office of Management and Budget recently modified the definition of the term "minority" contained in Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting. *See* 62 Fed. Reg. 58782 (October 30, 1997).

distributions from the business in proportion to their equity interests.[482] This requirement would be similar to the eligibility standards for minority-owned businesses adopted but never implemented for the broadband PCS auctions, and to the eligibility standards recently proposed for the auction of pending broadcast license applications.[483] In addition, we seek comment on alternate formulas that might be appropriate for determining eligibility for minority-based provisions.[484]

[482] We note that these restrictions differ from the benchmarks used to attribute ownership of broadcast stations for purpose of our multiple ownership restrictions set forth in 47 C.F.R.§ 73.3555, where the intent is to identify ownership interests in, or relationships to, a licensee potentially conferring the ability to influence or control the operations of a licensee, including core functions, such as programming. Notice of Proposed Rulemaking in MM Docket No. 94-150, et al. 10 FCC Rcd 3606, 3614 (1995); Attribution of Ownership Interests, 97 FCC 2d 997, 999, 1005 (1984), recon. 58 RR 2d 604 (1985), further recon. 1 FCC Rcd 802 (1986). For that purpose, ownership interests below 50% are attributed but nonvoting and other passive interests are generally disregarded. Our tentative view is that a more restrictive approach is warranted here to safeguard the integrity of our minority ownership policy by strictly limiting it to circumstances in which minority owners will have de facto and de jure control of the license.

[483] *See* Broadcast NPRM at p 88.

[484] *See, e.g.*, Implementation of Section 309(j) of the Communications Act (Fifth Report and Order), 9 FCC Rcd 5532, 5611-13 pp 183, 185 (1994), recon. Fifth Memorandum Opinion and Order, 10 FCC Rcd 403 (1994), modified, Sixth Report and Order, 11 FCC Rcd 136 (1995), aff'd sub nom, Omnipoint v. FCC, 78 F.3d 620 (D.C.. Cir. 1996) (due to the "exceptionally great financial resources" required by broadband PCS applicants, they qualify for preferential treatment so long as minorities hold 25 percent of the equity and 50.1 percent of the voting stock, provided no single investor holds 25 percent of the corporation's passive equity). The favorable bidding credits originally intended to enhance the opportunities of minority- and female-owned small businesses were suspended after the decision in Adarand. In Omnipoint the court upheld our decision in the Sixth Report and Order to make these credits available to small businesses

176. We also observe that the Office of Management and Budget ("OMB") recently modified its standards for the classification of federal data on race and ethnicity.[485] Specifically, OMB: (1) separated the category for Asian and Pacific Islander category into two categories -- "Asian" and " Native Hawaiian or Other Pacific Islander"; and (2) changed the term "Hispanic" to "Hispanic or Latino". We previously have used this standard to define the term "minority" for purposes of our designated entity provisions,[486] and seek comment on whether we should similarly amend the current definition in our rules.[487]

b. Gender-based designated entity provisions

177. We seek comment on whether special policies are warranted for female- owned applicants. We note that the constitutionality of our former practice of awarding comparative preferences for female ownership was not

---

following Adarand.

[485] *See* Office of Management and Budget, Revisions to the Standards for the Classification of Federal Data on Race Ethnicity, Notice of Decision, 62 Fed Reg 58782 (October 30, 1997).

[486] *See* Competitive Bidding Fifth Memorandum Opinion and Order, 10 FCC Rcd at 432 p 52 (1994) (revising 47 C.F.R.§ 24.720(i) to conform with the definition of "minority" found at, inter alia, 47 U.S.C.§ 309(i)(3)(c)(ii) and 47 C.F.R.§ 1.1621(b)). *See also* Broadcast Equal Employment Opportunity Rules and FCC Form 395, 70 FCC 2d 1466, 1473 (1979); Race and Ethnic Standards for Federal Statistics and Administration Reporting, OMB Statistical Policy Directive No. 15 (1977).

[487] 47 C.F.R.§ 1.2110(b)(2).

addressed by the Supreme Court in Metro[488] and that we suspended that practice following Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992), which held, under "intermediate" scrutiny, that our gender preference was not shown to be substantially related to achieving program diversity and that it was thus unconstitutional.. More recently, the Supreme Court has ruled that a state program, which makes distinctions based upon gender, must be supported by an "exceedingly persuasive justification" in order to withstand constitutional muster. United States v. Virginia Military Institute, 116 S.Ct 2264, 2274- 76 (1996). We seek comment on whether there is sufficient evidence to justify special provisions for women-owned businesses under that standard.

178. As with minority-based provisions, we tentatively conclude that to the extent consistent with applicable constitutional standards, we should take steps to further our statutory goal of making certain that women have the opportunity to provide spectrum-based services pursuant to Section 309(j)(4). We seek comment on how we can modify our designated entity provisions, consistent with the standards set forth in recent court decisions. In particular, we seek comment on what tools, such as bidding credits, might be used consistent with judicial precedent. In addition, we seek comment on whether we should limit any tools designed to encourage participation in our auction program by women-owned businesses that also qualify as small businesses. Commenters advocating the adoption of such measures at this time should address the constitutional issue and present specific

---

[488] Metro Broadcasting Inc. v. FCC, 497 U.S. 547 (1990) (applying an intermediate scrutiny standard, the Supreme Court upheld the constitutionality of our treatment of minority ownership policies in comparative proceedings).

empirical evidence supporting their views.

c. Rural Telephone Company provisions

179. In the Commission's recent report to Congress on the spectrum auctions, we stated our belief that auctions have generally provided rural telephone companies with favorable opportunities.[489] We observed that, to date, rural telephone companies have won about 44 percent of the 123 rural Basic Trading Areas (BTA) licenses in the United States and we noted some examples of rural telephone companies' successes in offering broadband PCS.[490] In keeping with our duties under the Act, however, we seek comment on whether there are mechanisms that might further opportunities for rural telephone companies to provide spectrum based services.

2. Installment Payments

180. *Background.* We are required by statute to provide incentives to ensure participation by small businesses and other "designated entities" when implementing our authority to conduct auctions, as set forth in Section 309(j) of the Communications Act.[491] Among other methods, allowing winning bidders to pay for their licenses using installment plans has been one method we have used to encourage small business involvement in the wireless marketplace. As discussed in Section III.B.5, *supra*, in this *Third Report and Order* we suspend the use of installment payments for the foreseeable future. In lieu of installment payments, we have adopted a

---

[489] The FCC Report to Congress on Spectrum Auctions, WT Docket 97-150, at p. 25 (rel. Oct. 9, 1997).

[490] *Id.* at 25-26.

[491] 47 U.S.C. §§ 309(j)$0(A), (D).

schedule of bidding credits applicable to small businesses that is higher than that which we originally proposed.[492]

181. *Discussion.* We observed in the Notice in this docket that small businesses have been successful in the auctions in which installment payments plans were offered.[493] We therefore seek comment on ways in which the Commission can provide an effective installment payment program while at the same time minimizing the concerns (e.g., licensee default or difficulty meeting financial obligations to the Commission) that have led to our decision to suspend the use of installment payments for the present time. We seek comment, for example, on how the Commission can create an installment payment plan which fulfills our sometimes incongruent goals of encouraging only serious, financially qualified small business applicants to apply for licenses, ensuring the rapid provision of service to the public, and guaranteeing that the American public is reasonably compensated for the use of the spectrum being auctioned. We also seek comment on how the Commission might fashion an installment payment program that is consistent with the provision of the Balanced Budget Act that requires that all proceeds from certain future auctions be deposited in the United States Treasury not later than September 30, 2002. In this regard, we note that under most of the installment payment plans previously offered by the Commission, winning bidders have been permitted to pay for their licenses over the entire 10 year license term.[494] If we were to make installment plans available in the future, we interpret this legislation as requiring that all payments of principal and interest for covered auctions

---

[492] *See* Section III.B.5., *supra*. *See also, Notice* at ¶ 32.

[493] *Notice* at ¶ 34.

[494] *See, e.g.*, 47 C.F.R. § 24.711(b)(1).

be deposited in the United States Treasury by the statutory deadline for collection, which is approximately five years away. Finally, we seek comment on means other than bidding credits and installment payments by which the Commission might facilitate the participation of small businesses and other designated entities in our spectrum auction program. Commenters should provide sufficient detail to assist the Commission in fashioning a program based upon their comments.

182. We also note that under our current rules, winning bidders that are designated entities are not required to pay their second down payment until petitions to deny filed against them are dismissed or denied. In the interim, designated entity winning bidders for the same auction with no petitions filed against them are required to submit their second down payments earlier because their licenses are ready for grant. Because Section 1.2110(e)(3)(i) of our rules provides that interest rates on installment payments will be based on the rate of U.S. Treasury obligations at the time of licensing, in previous auctions this has had the result of establishing different rates of interest on installment payments for winning bidders in the same auction.[495] In the event we reinstate installment payments in the future, we seek comment on whether we should establish the interest rate based upon the rate of U.S. Treasury obligations on the date of the close of the auction. We also seek comment on one aspect of our rules relating to the calculation of the total default payment owed where a winning bidder defaults on multiple licenses.

---

[495] *See* "Comment Requested on 7 Percent Interest Rate Imposed on C Block Installment Payment Plan Notes," Public Notice, DA 97-1152 (rel. June 2, 1997) (in which the Bureau sought comment on several requests for of the interest rate assigned to PCS C block licensees conditionally granted on September 17, 1996).

3. Attribution of Gross Revenues of Investors and Affiliates

183. *Background.* In the Notice, we proposed to adopt uniform rules and definitions for the attribution of gross revenues of investors and affiliates for all auctionable services. Some of our service-specific competitive bidding rules require that, in determining whether an applicant meets certain size-based eligibility requirements, we consider, among other things, the gross revenues of certain investors in the applicant and the affiliates of attributable investors. These service-specific rules have established varying standards of attribution. For example, in both narrowband and broadband PCS, the gross revenues and total assets of an applicant, together with those of its affiliates and persons who hold an interest in the applicant or its affiliates, must be below a certain threshold in order for the applicant to qualify as a small business or entrepreneur.[496] However, in order to avoid counting the revenue of all of these entities, the rules for each service provide different exceptions whereby the applicants can create control groups. [497] For example, our broadband PCS rules provide two control group exceptions,[498] while our narrowband PCS rules provide only one control group exception.

184. In the 900 MHz SMR service, to determine whether an applicant qualifies as a small business, we attribute the revenues of parties holding partnership and other ownership interests and any stock interest amounting to 20 percent or more

---

[496] The total assets test has been used only to determine entrepreneur status.

[497] *See, e.g.*, 47 C.F.R.§ 24.709(b)(3), (b)(5). A control group is an entity, or a group of individuals or entities, that possesses de jure and de facto control of an applicant or licensee.

[498] 47 C.F.R.§ 24.709(b).

of the equity, or outstanding stock, or outstanding voting stock of the applicant in conformance with the Commercial Mobile Radio Service (CMRS) spectrum cap attribution standard.[499] In contrast, under our MDS rules we attribute the gross revenues of the applicant and all of the applicant's affiliates (as defined in 47 C.F.R. § 1.2110(b)(4)).[500]

185. *Discussion.* In the Notice, we proposed to adopt a "controlling interest" standard, similar to that which we have recently adopted in our rules for LMDS,[501] as our general attribution rule for all future auctions. Under this standard, determination of eligibility for small business provisions would be made by attributing the gross revenues only of principals of the applicant who exercise both "de jure" and "de facto" control, and their affiliates. Nevertheless, we seek further comment on the controlling interest standard, and whether it is sufficient to calculate size so that only those entities truly meriting small business status qualify for bidding credits. We also ask commenters whether alternate standards for attributing the gross revenues of investors and affiliates in an applicant would better meet our goals. Commenters should specify what alternatives could be applied.

186. We note that our intent in proposing this standard is to provide flexibility that will enable legitimate small businesses to attract passive financing in a highly competitive

---

[499] 47 C.F.R.§ 90.814(g). *See* 47 C.F.R.§ 20.6 (CMRS Spectrum Cap).

[500] 47 C.F.R.§ 21.961(b).

[501] *See, e.g.*, In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding - Tenth Report and Order, PP Docket No. 93-253 (rel. November 21, 1996) (IVDS); LMDS Second Report and Order at p 352 (LMDS).

and evolving telecommunications marketplace.[502] In the Notice, we preliminarily concluded that structuring our standard in this manner will not invite abuse. In this regard, we seek comment on whether this proposed standard would be strengthened by imposing a minimum equity requirement (e.g., 15 percent) that any person or entity identified as controlling must hold. Alternatively, we ask whether we should not adopt a minimum equity requirement, but rather indicate only that an absence of equity would raise a question as to whether de facto control exists.

187. We note that for purposes of calculating equity held in an applicant, we provide for full dilution of certain stock interests, warrants, etc.[503] Finally, we note that we require detailed reporting of all ownership interests as part of the general application requirement adopted in this *Third Report and Order*,[504] and under the proposed controlling interest standard would apply the comprehensive affiliation rule to all investors in an applicant. Thus, passive interests that were otherwise non-attributable would be attributed if they are affiliates under this rule. Finally, we note that the Commission reserves the right to conduct random audits of auction applicants and licensees in order to verify information provided regarding eligibility for small business provisions.[505] We seek

---

[502] We note, however, that in seeking comment regarding the auction of initial licenses for certain broadcast stations, the Commission has proposed stricter attribution standards and eligibility requirements for applicants seeking to qualify for minority-based provisions. *See* Broadcast NPRM at p 18.

[503] *See* 47 C.F.R.§ 24.709(b)(7).

[504] *See* Section III.C.3, *infra*.

[505] *See* Section III.C.5, *supra*.

comment on our proposed rule.[506]

B. Payment Issues

1. Default Payments

188. *Background.* Section 1.2104(g) of our rules provides that where a winning bidder defaults on a license the bidder becomes subject to a default payment equal to the difference between the amount bid and the winning bid the next time the license is offered by the Commission (net or gross, whichever is less) plus an additional payment equal to three percent of the subsequent winning bid or the amount bid (net or gross, whichever is less).[507] In the past, where a bidder has defaulted on multiple licenses, this rule has been interpreted to require that the amount of the default payment be determined on a license-by-license basis, and then added together to determine the total default payment assessed.[508]

189. *Discussion.* We seek comment on whether we should modify Section 1.2104(g) to provide that where a winning bidder defaults on multiple licenses the default payment will be determined based upon the aggregate winning bid and the aggregate winning bid the next time the licenses are offered by the Commission. We recognize that assessing default payments

---

[506] *See* Appendix E.

[507] *See* 47 C.F.R.§ 1.2104(g)(2).

[508] *See* BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Order, 11 FCC Rcd 14399 (WTB) (1996) (assessing a $67,695,653.23 default payment for failure to submit the required down payment for 18 licenses won in the C block auction), reconsideration denied, Order, 12 FCC Rcd 6606 (WTB) (1997), Application for Review Pending.

through this method could significantly alter the amount of the default payment assessed under our rules. In this regard, we seek comment on whether this system could encourage insincere bidding and defaults since it could greatly reduce the effective penalty for a default. To the extent that a bidder is already intending to default on a license whose price at reauction is anticipated to exceed the initial bid price the effective penalty for defaulting on additional licenses would be limited to three percent of the subsequent winning bid or the amount bid, whichever is lower. Since the potential defaulter would not be facing the full harm caused by the default on the additional license, the incentive for insincere bidding and default could be too great. Indeed, this modification could encourage speculation by encouraging a high bidder on a relatively high valued license who anticipates default to purposely bid and default on a relatively low valued license in order to lessen the default payment assessed under our rules. Finally, we seek comment on whether such a modification could function without nullifying the provision in Section 1.2104(g) discussed above assessing an additional default payment equal to three percent of the subsequent winning bid or the amount bid, whichever is lower.[509]

C. Administrative Filing Periods for Applications and Petitions to Deny

190. *Background.* Previously, the Commission has provided a 30-day period for filing of petitions to deny.[510] A 30-day petition to deny period will be used for the upcoming

---

[509] *See* 47 C.F.R.§ 1.2104(g)(2).

[510] *See* 47 C.F.R.§ 1.2108.

paging and LMDS auctions.[511] As discussed above (see Section III.A), in this *Third Report and Order* we amend Section 1.2108 of our rules to conform to the provisions in the Balanced Budget Act regarding the filing period for petitions to deny applications for initial licenses in auctionable services.[512] Specifically, notwithstanding Section 309(b) of the Communications Act,[513] Section 1.2108 as amended will provide that the Commission shall not grant a license less than seven days after public notice that long-form applications have been accepted for filing and that in all cases the period for filing petitions to deny shall be no shorter than five days.[514]

191. *Discussion.* Although we believe that in light of Congress' directive in the Balanced Budget Act a shortened petition to deny period is generally appropriate for future auctions, we seek comment on the appropriate length of a petition to deny period in light of this legislation. For example, we seek comment on whether there are instances in which the Commission should provide for a longer period than the minimums set forth in the statute for the filing of petitions to deny or for the grant of initial licenses in auctionable services (5 days and 7 days, respectively). In particular, we ask commenters to address whether auctions for specific services (e.g., broadcast licenses) require longer periods for the filing of petitions to deny, and why this may be so.

---

[511] *See* 47 C.F.R.§ 90.163(a)(4)(Paging); 47 C.F.R.§ 101.43(a)(4)(LMDS).

[512] *See* 47 C.F.R.§ 1.2108. *See also*, Balanced Budget Act,§ 3008.

[513] 47 U.S.C.§ 309(b).

[514] 47 C.F.R.§§ 1.2108(b), (c).

D. Competitive Bidding Rules and Procedures for the Auction of General Wireless Communications Services (GWCS) Licenses

192. *Background.* On July 31, 1995, the Commission adopted the *Second Report and Order* in ET Docket No. 94-32 establishing auction and service rules for the General Wireless Communications Service (GWCS) in the 4660-4685 MHz band.[515] Subsequently, several parties filed petitions for reconsideration of the *Second Report and Order* that remain pending before the Commission.[516] The 1993 Omnibus Budget Reconciliation Act requires that 5 MHz[517] of this spectrum be auctioned and licensed not later than August 9, 1998,[518] and to comply with this deadline, the Commission has announced an auction date for licenses in the GWCS as May 27, 1998.[519]

---

[515] *See* Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, Second Report and Order, 11 FCC Rcd 624 (1995) ("GWCS Second Report and Order").

[516] *See* Joint Petition for Reconsideration, Association of American Public Television Stations, et al (April 6, 1995). *See also*, Petition for Reconsideration of Wireless Cable Association International (September 8, 1995); Petition for Clarification and Reconsideration of the Association for Maximum Service Television, Inc. (September 8, 1995).

[517] We note that an additional five megahertz of this spectrum was auctioned as part of the spectrum offered in the WCS auction.

[518] *See* 47 U.S.C. § 309(j)(9). The auction for this service has been delayed pending resolution of potential interference with U.S. operations. *See* Defense Communications, "Federal Frequency Spectrum Sale Could Impair Military Operations," United States General Accounting Office Report to Congressional Committees, June, 1997, and letters included therein.

[519] *See* "FCC Announces Auction Schedule for the General Wireless Communications Service," Public Notice, DA 97-2634 (rel. December 17, 1997).

193. *Discussion*. We tentatively conclude that the Part 1 rules we adopt in the *Third Report and Order* should apply to the auction of GWCS spectrum and specifically supersede the previously-adopted GWCS rules setting forth auction rules and procedures.[520] In this regard, consistent with our decision in the *Third Report and Order*, we note that we would no longer offer installment payments as a means of financing small business participation in the GWCS auction, but instead would offer somewhat higher bidding credits. Employing Part 1 rules for the GWCS auction furthers our goal of simplifying and streamlining all competitive bidding rules and procedures for future auctions. In addition, by applying the Part 1 rules to the GWCS auction, we assure that GWCS auction participants, like participants in other future auctions, benefit from the experience we have gained in the 15 spectrum auctions we have conducted to date. We seek comment on this tentative conclusion.

194. In light of the statutory deadline for the auction and licensing of GWCS spectrum, we also tentatively conclude to use our discretion to truncate the petition to deny period for the grant of licenses in the GWCS auction. We believe that a shortened petition to deny period will assure issuance of the GWCS licenses by Congress' deadline. As discussed above (see Section IV.C), notwithstanding Section 309(d)(1) of the Communications Act, the Balanced Budget Act provides for shortened periods for the filing of petitions to deny and for the grant of licenses.[521] Under this provision, the Commission is permitted to grant any application for authorization assigned

[520] *See* 47 C.F.R.§§ 26.1 et seq.

[521] Section 3008, Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997).

under competitive bidding not earlier than 7 days following public notice that an application has been accepted for filing, and may specify a period of not less than 5 days for filing petitions to deny.[522] We seek comment on this tentative conclusion.

V. CONCLUSION

195. Based on the experience we have gained from our 15 completed auctions, as well as the feedback we have received from bidders, we believe the time has come to streamline our competitive bidding rules in order to make our licensing process more efficient. In the past, we have adjusted our auction procedures for different services as we gained experience with the process, resulting in the adoption of different procedures for different auctionable services. This *Third Report and Order* amends Subpart Q of Part 1 of the Commission's rules[523] to reflect substantive amendments and modifications intended to simplify these regulations, supersede unnecessary rules wherever possible, and eliminate the need to conduct separate, comprehensive rule making proceedings prior to each auction. We believe that the rules we adopt today will benefit bidders and the auction process generally. We also believe these rules will help to provide more specific guidance and flexibility on a number of issues that will increase the overall effectiveness of our auctions. This Second Further Notice of Proposed Rule Making seeks comment on additional issues relating to our general competitive bidding rules for all auctionable services. We believe that these proposals will further enable us to achieve our goals of simplifying and streamlining our regulations in order to increase the overall

[522] *Id.*

[523] 47 C.F.R.§§ 1.2101 et seq.

efficiency of the competitive bidding process.

VI. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Regulatory Flexibility Act

196. The Final Regulatory Flexibility analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. Section 604, is contained in Appendix B.

197. With respect to this Second Further Notice of Proposed Rulemaking, an Initial Regulatory Flexibility Analysis is contained in Appendix C. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the Initial Regulatory Flexibility Analysis. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis we ask a number of questions in our Initial Regulatory Flexibility Analysis regarding the prevalence of small businesses in the industry. Comments on the Initial Regulatory Flexibility Analysis must be filed in accordance with the same filing deadlines as comments on the Second Further Notice of Proposed Rulemaking, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Second Further Notice of Proposed Rulemaking, including the initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96- 354, 94 Stat. 1164,

5 U.S.C. § 601 *et seq.* (1981).

B. Ex Parte Presentations

198. This Second Further Notice of Proposed Rule Making is a permit but disclose notice and comment rule making proceeding. Ex parte presentations are permitted, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

C. Comments

199. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before February 6, 1998, and reply comments on or before February 17, 1998. In addition, a courtesy copy should be delivered to Josh Roland and Ken Burnley, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 2025 M Street, Room 5202, Washington, DC 20554. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus ten copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

D. Additional Information

200. For further information concerning the *Third Report and Order* and Second Further Notice of Proposed Rule Making, contact Josh Roland or Mark Bollinger, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554, (202) 418- 0660.

E. Ordering Clauses

201. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 155(c)(1), 303(r), and 309(j), this *Third Report and Order* and Second Further Notice of Proposed Rule Making is hereby ADOPTED, and Part 1, Subpart Q of the Commission's rules are amended as set forth in Appendix D, effective 60 days after publication in the Federal Register. The information collection contained in these rules becomes effective 60 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

202. IT IS FURTHER ORDERED THAT pursuant to 47 U.S.C.§155(c) and 47 C.F.R. ss 0.131(c) and 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures as set forth herein, including the authority to seek comment on and set forth mechanisms relating to the day-to-day conduct of specific auctions.

203. IT IS FURTHER ORDERED THAT the Secretary shall send a copy of this *Third Report and Order* and Further

Notice of Proposed Rule Making, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. ss 601 *et seq*.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A
List of Parties

I. Comments in Response to the Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making

Parties Filing Comments

Airadigm Communications, Inc., Loli, Inc., New Wave Communications, Inc., KMC
Interactive TV, Inc., MAR IVDS, Inc., New Wave PCS, Inc. and Euphemia Banas
("Airadigm")
AirTouch Paging, Inc. ("AirTouch")
Alarm Industry Communications Committee ("AICC")
American Automobile Association ("AAA")
American Mobile Telecommunications Association, Inc. (AMTA)
AT&T Wireless Services, Inc. ("AT&T")
Automated Credit Exchange ("ACE")
Cellular Telecommunications Industry Association ("CTIA")
Compu-DAWN, Inc. ("Compu-DAWN")
Cook Inlet Region, Inc. ("CIRI")
Coalition of Institutional Investors: Fleet Equity Partners, Media/Communications Partners,
OneLiberty Ventures and Spectrum Equity Associates ("CII")
Hughes Electronic Corporation ("Hughes")
Interactive Video Data Trade Association ("ISTA")
Merlin Telecom, Inc. ("Merlin")
Metrocall, Inc. ("Metrocall")
Motorola, Inc. ("Motorola")
Mountain Solutions, Ltd. ("Mountain Solutions")
National Telephone Cooperative Association ("NTCA")

Nextel Communications, Inc. ("Nextel")
Paging Network, Inc. ("PageNet")
Personal Communications Industry Association ("PCIA")
Pocket Communications, Inc. ("Pocket")
Western Wireless Corporation ("WWC")

Parties Filing Reply Comments

Airadigm Communications, Inc., Loli, Inc., New Wave Communications, Inc., KMC
Interactive TV, Inc., MAR IVDS, Inc., New Wave PCS, Inc., and Euphemia Banas
("Airadigm")
AirTouch Paging, Inc. ("AirTouch")
Alarm Industry Communications Committee ("AICC")
American Automobile Association ("AAA")
CellNet Data Systems, Inc. ("CellNet")
Cook Inlet Region, Inc. ("CIRI")
Ericsson, Inc. ("Ericsson")
U.S. Federal Trade Commission, Bureau of Consumer Protection ("FTC")
General Wireless, Inc. ("GWI")
Interactive Video Data Trade Association ("ISTA")
IVDS Enterprises, Joint Venture ("IVDS Enterprises")
Merlin Telecom, Inc. ("Merlin")
Mountain Solutions, Ltd. ("Mountain Solutions")
Narrowband PCS Companies ("NPCS")
Nextel Communications, Inc. ("Nextel")
NextWave Telecom, Inc. ("NextWave")
Omnipoint Corporation ("Omnipoint")
The Rural Telecommunications Group ("RTG")
Western Wireless Corporation ("WWC")

II. Comments in Response to the Public Notice, "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," WT Docket 97-82, DA 97-697 (rel. June 2, 1997)

Parties Filing Comments

Airadigm Communications, Inc. (Airadigm)
ALLTEL Communications, Inc. (ALLTEL)
Alpine PCS, Inc. (Alpine)
AmeriCall International, L.L.C. (AmeriCall)
Bay Springs Telephone Company, Inc. (Bay Springs)
Bear Stearns
BellSouth Corporation
BIA Capital Corporation (BIA Capital)
Brookings Municipal Utilities (BMU)
Central Wireless Partnership (CWP)
Chase Telecommunications, Inc. (Chase)
ClearComm, L.P.
Comcast Corporation
Community Service Communications, Inc. (CSCI)
ComScape Telecommunications of Charleston License, Inc. (ComScape)
Conestoga Wireless Company (Conestoga)
CONXUS Communications, Inc. (CONXUS)
Cook Inlet Region, Inc., Cook Inlet Western Wireless, PV/SS PCS, L.P., Western Wireless
Corporation AirGate Wireless, L.L.C., Aerial Communications, Inc., TeleCorp, Inc., and
Airadigm Communications, Inc. (collectively, CIRI)
Creative Airtime Services, L.L.C. (Creative)
Cyber Sites, L.L.C.
Dewey Ballantine

DiGiPH PCS, Inc. (DiGiPH)
Duluth PCS, Inc., St. Joseph PCS, Inc., and West Virginia PCS, Inc. (collectively, Duluth PCS)
Eldorado Communications, L.L.C. (Eldorado)
Fortunet Communications, L.P. (Fortunet)
General Wireless Inc. (GWI)
Holland Wireless, L.L.C., Wireless 2000, Inc., and Northern Michigan PCS Consortium, (collectively, Holland)
Horizon Personal Communications, Inc. (Horizon)
Indus, Inc.
Integrated Communications Group (Integrated)
Kansas Personal Communications Services, Ltd. (KPCS)
Ken W. Bray
Magnacom Wireless, L.L.C., PCSouth, Inc., and Communications Venture PCS Limited Partnership (collectively, Magnacom)
MCI Communications Corporation (MCI)
Meretel Communications Limited Partnership (Meretel)
MFRI, Inc.
Morris Communications, Inc. (Morris)
National Wireless Resellers Association (NWRA)
National Association of Black-Owned Broadcasters, Inc. (NABOB)
National Association of Black Telecommunications Professionals, Inc. (NABTP)
National Telephone Cooperative Association (NTCA)
Nextel Communications, Inc. (Nextel)
NextWave Telecom, Inc. (NextWave)
Northcoast Communications, L.L.C. (Northcoast)
Official Committee of Unsecured Creditors of Pocket Communications, Inc. (Pocket Creditors)
Omnipoint Corporation
OneStop Wireless
OnQue Communications, Inc. (OnQue)

PCS Plus L.L.C. and McKenzie Telecommunications Group, Inc. (collectively, PCS Plus)
Pioneer Telephone Association, Inc. (Pioneer)
Pocket Communications, Inc. (Pocket)
Point Enterprises, Inc. (Point)
R&S PCS, Inc. (R&S)
RFW, Inc.
Rural Telephone Finance Corporation (RTFC)
Small Business Coalition (SBC)
SouthEast Telephone Limited Partnership, Ltd. (SouthEast Telephone)
Southwestern Bell Mobile Systems (SBMS)
Spectrum Watch
Sprint Spectrum L.P.
Sprint Corporation
Tennessee L.P. 121 (Tennessee)
Toronto Dominion Bank and Toronto Dominion Securities (collectively, Toronto Dominion)
Urban Communicators PCS Limited Partnership (Urban Comm)

Parties Filing Reply Comments

Airtel Communications, Inc. (Airtel)
ALLTEL
Alpine
American Mobile Telecommunications Association, Inc. (AMTA)
Antigone Communications Limited Partnership and PCS Devco, Inc. (collectively, Antigone/Devco)
BellSouth Corporation
Carlson Technologies, Inc. (Carlson)
Cellexis International, Inc. (Cellexis)
ClearComm, L.P.

Comcast Corporation
Conestoga
CONXUS
CIRI
Duluth PCS
Fortunet
GWI
GTE Service Corporation (GTE)
Ken W. Bray
MCI
Millison Investment Management, Inc. (MIM)
Mountain Solutions LTD, Inc. (Mountain Solutions)
Nextel
NextWave
Northcoast
Omnipoint Corporation
OnQue
PCS Wisconsin, LLC
PrimeCo Personal Communications, L.P. (PrimeCo)
Radiofone PCS, L.L.C. (Radiofone)
R&S
RTFC
Sprint Spectrum L.P.
Stan P. Doyle
Telecommunications Resellers Association (TRA)
UniDial Communications (UniDial)
Urban Comm
U.S. Airwaves, Inc.
Wireless Nation, Inc.

Parties Filing Ex Parte Comments

AirGate Wireless, July 18, 1997
AirGate Wireless, July 22, 1997

AirGate Wireless, September 9, 1997
Alpine, September 17, 1997
Alpine, September 23, 1997
AmeriCall, July 11, 1997
AmeriCall, August 5, 1997
AmeriCall and Hughes Network Systems, Inc., September 16, 1997
AmeriCall, ClearComm, and Chase, September 17, 1997
BIA Capital, August 4, 1997
Chase, August 11, 1997
ClearComm, August 7, 1997
Congressman Rick Boucher, July 25, 1997
Congressman Richard Burr, August 11, 1997
Congressman Thomas Davis, July 30, 1997
Congressman John D. Dingell, September 16, 1997
Congressman Steny H. Hoyer, August 7, 1997
Congresswoman Sue W. Kelly, August 11, 1997
Congressman W.J. "Billy" Tauzin, August 13, 1997
Congressmen W.J. "Billy" Tauzin and Edward J. Markey, September 16, 1997
CONXUS, August 27, 1997
Cook Inlet Communications, August 5, 1997
Cook Inlet Communications, August 15, 1997
Cook Inlet Region, Inc., September 23, 1997
El Dorado, August 13, 1997
GWI, August 4, 1997
GWI, August 15, 1997
GWI, August 18, 1997
Magnacom Wireless, LLC, August 13, 1997
MCI, August 14, 1997
NextWave, June 23, 1997
NextWave, July 29, 1997
NextWave, August 5, 1997
Nokia, September 15, 1997

Nokia, September 16, 1997
Northern Michigan PCS Consortium, L.L.C., August 14, 1997
Omnipoint Corporation, August 18, 1997
Omnipoint Corporation, September 3, 1997
Omnipoint Corporation, September 5, 1997
Omnipoint Corporation, September 23, 1997
R&S, August 11, 1997
Senator Christoper S. Bond, July 14, 1997
Senator Paul D. Coverdell, September 24, 1997
Senator Pete V. Domenici, September 10, 1997
Senators James M. Inhofe, Don Nickles, and Conrad Burns, August 7, 1997
Senator John McCain, August 19, 1997
Senator John McCain, September 18, 1997
Senator Daniel Patrick Moynihan, August 4, 1997
Triumph Capital, August 7, 1997
Triumph Capital, September 23, 1997 ("McCarthy Letter")
Urban Comm, August 21, 1997
Urban Comm, September 17, 1997
U.S. Small Business Administration, September 8, 1997 ("Glover Letter")

III. Comments in Response to the Wireless Telecommunications Bureau's Public Notice, "Comment Requested on 7 Percent Interest Rate Imposed on C Block Installment Payment Plan Notes," DA 97-1152 (rel. June 2, 1997).

Parties Filing Comments

Airadigm Communications, Inc. ("Airadigm")
Comscape Telecommunications of Charleston License, Inc. ("ComScape")
DiGiPH PCS, Inc. ("DiGiPH")

Eldorado Communications, L.L.C., KMtel L.L.C., Mercury PCS L.L.C., and Miccom Associates ("Eldorado")
Fortunet Communication, L.P. ("Fortunet")
Indus, Inc, and Chase Telecommunications, Inc. ("Indus and ChaseTel")
Integrated Communications Group Corporation ("Integrated")
Kansas Personal Communication Services, Inc. ("KPCS")
Vincent D. McBride ("McBride")
Morris Communications, Inc. ("Morris")
National Association of Black-Owned Broadcasters, Inc. ("NABOB")
National Telephone Cooperative Association ("NTCA")
NextWave Telecom, Inc. ("NextWave")
Pinnacle Telecom, L.P. ("Pinnacle")
Pioneer Telephone Association, Inc. ("Pioneer")
Rural Telephone Finance Cooperative ("RTFC")
September 17 Alliance ("Alliance")
Sprint Spectrum, L.P. ("Sprint")
Urban Communicators PCS Limited Partnership ("Urban Comm")
Quantum Communications Group, Inc. ("Quantum")
Wireless 2000, Inc., Northern Michigan PCS Consortium, L.L.C., PCSouth, Inc., and Communications Venture PCS Limited Partnership ("Wireless 2000")

Parties Filing Reply Comments

Omnipoint Corporation ("Omnipoint")
Savannah Independent PCS Corporation, Brookings Municipal Utilities, PVT Wireless Limited Partnership, PCS Plus, L.L.C., Southwestern Minnesota PCS Limited Partnership, Western Minnesota PCS Limited Partnership, North Dakota PCS Limited Partnership, and Horizon Personal Communications, Inc. ("Joint C block Applicants").

* * * APPENDICES B & C OMITTED * * *

APPENDIX D
Final Rules

Parts 1, 21, 24, 27, 90 and 95 of Title 47 of the Code of Federal Regulations are amended to read as follows:

PART 1 - PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: 47 U.S.C. 151, 154, 207, 303 and 309(j), unless otherwise noted.

2. Section 1.2101 is revised to read as follows:

§1.2101 Purpose.

The provisions of this subpart implement Section 309(j) of the Communications Act of 1934, as added by the Omnibus Budget Reconciliation Act of 1993 (Public Law 103-66) and the Balanced Budget Act of 1997 (Public Law 105-33), authorizing the Commission to employ competitive bidding procedures to choose from among two or more mutually exclusive applications for certain initial licenses.

3. Section 1.2102 is amended by revising paragraphs (a) and (b) to read as follows:

§ 1.2102 Eligibility of applications for competitive bidding.

(a) Mutually exclusive initial applications are subject to competitive bidding.

(b) The following types of license applications are not subject to competitive bidding procedures:

(1) Public safety radio services, including private internal radio services used by state and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that

(i) Are used to protect the safety of life, health, or property; and

(ii) Are not commercially available to the public;

(2) Initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(3) Noncommercial educational and public broadcast stations described under 47 U.S.C.§397(6).

Note to§1.2102: To determine the rules that apply to competitive bidding, specific service rules should also be consulted.

4. Section 1.2103 is amended by revising paragraph (a) and adding paragraph (d) to read as follows:

§ 1.2103 Competitive bidding design options.

(a) The Commission will choose from one or more of the following types of auction designs for services or classes of services subject to competitive bidding:

(1) Simultaneous multiple-round auctions (using remote or on-site electronic bidding);

(2) Sequential multiple round auctions (using either oral ascending or remote and/or on-site electronic bidding);

(3) Sequential or simultaneous single-round auctions (using either sealed paper or remote and/or on-site electronic bidding); and

(4) Combinatorial (package/contingent) bidding auctions.

*****

(d) The Commission may use real time bidding in all electronic auction designs.

5. Section 1.2104 is amended by revising paragraphs (d) and (g) to read as follows:

§ 1.2104 Competitive bidding mechanisms.

*****

(d) *Minimum Bid Increments, Minimum Opening Bids and Maximum Bid Increments*. The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms. The Commission also may establish minimum opening bids and maximum bid increments on a service-specific basis.

*****

(g) *Withdrawal, Default and Disqualification Payment.* As specified below, when the Commission conducts an auction pursuant to§1.2103, the Commission will impose payments on bidders who withdraw high bids during the course of an auction, or who default on payments due after an auction closes or who are disqualified.

(1) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction is subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. The bid withdrawal payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the difference between the gross

withdrawn bid and the subsequent gross winning bid, whichever is less. No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid. This payment amount is deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(2) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the payment in paragraph (g)(1) plus an additional payment equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount. If either bid amount is subject to a bidding credit, the 3 percent credit will be calculated using the same bid amounts and basis (net or gross bids) as in the calculation of the payment in paragraph (g)(1) of this section. Thus, for example, if gross bids are used to calculate the payment in paragraph (g)(1), the 3 percent will be applied to the gross amount of the subsequent winning bid, or the gross amount of the defaulting bid, whichever is less.

*****

6. Section 1.2105 is revised to read as follows:

§ 1.2105 Bidding application and certification procedures; prohibition of collusion.

(a) Submission of Short-Form Application (FCC Form 175). In order to be eligible to bid, an applicant must timely submit a short-form application (FCC Form 175), together with any appropriate upfront payment set forth by Public Notice. Beginning January 1, 1999, all short-form applications must be

filed electronically.

(1) All short-form applications will be due:

(i) On the date(s) specified by Public Notice; or

(ii) In the case of application filing dates which occur automatically by operation of law (see, e.g., 47 CFR 22.902), on a date specified by Public Notice after the Commission has reviewed the applications that have been filed on those dates and determined that mutual exclusivity exists.

(2) The short-form application must contain the following information:

(i) Identification of each license on which the applicant wishes to bid;

(ii)(A) The applicant's name, if the applicant is an individual. If the applicant is a corporation, then the short-form application will require the name and address of the corporate office and the name and title of an officer or director. If the applicant is a partnership, then the application will require the name, citizenship and address of all general partners, and, if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee will be required. If the applicant is none of the above, then it must identify and describe itself and its principals or other responsible persons; and

(B) Applicant ownership information, as set forth in§1.2112.

(iii) The identity of the person(s) authorized to make or withdraw a bid;

(iv) If the applicant applies as a designated entity pursuant to§1.2110, a statement to that effect and a declaration, under penalty of perjury, that the applicant is qualified as a designated entity under§1.2110.

(v) Certification that the applicant is legally, technically, financially and otherwise qualified pursuant to Section 308(b)

of the Communications Act of 1934, as amended. The Commission will accept applications certifying that a request for waiver or other relief from the requirements of Section 310 is pending;

(vi) Certification that the applicant is in compliance with the foreign ownership provisions of Section 310 of the Communications Act of 1934, as amended;

(vii) Certification that the applicant is and will, during the pendency of its application(s), remain in compliance with any service-specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications. The Commission may require certification in certain services that the applicant will, following grant of a license, come into compliance with certain service-specific rules, including, but not limited to, ownership eligibility limitations;

(viii) An exhibit, certified as truthful under penalty of perjury, identifying all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure.

(ix) Certification under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to paragraph (a)(2)(viii) regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid;

Note to paragraph (a): The Commission may also request applicants to submit additional information for informational purposes to aid in its preparation of required reports to Congress.

(b) *Modification and Dismissal of Short-Form Application (FCC Form 175).* (1) Any short-form application (FCC Form 175) that does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to the applicable filing deadline. The application will be dismissed with prejudice and the upfront payment, if paid, will be returned.

(2) The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application. During the resubmission period for curing defects, a short-form application may be amended or modified to cure defects identified by the Commission or to make minor amendments or modifications. After the resubmission period has ended, a short- form application may be amended or modified to make minor changes or correct minor errors in the application. Major amendments cannot be made to a short- form application after the initial filing deadline. Major amendments include changes in ownership of the applicant that would constitute an assignment or transfer of control, changes in an applicant's size which would affect eligibility for designated entity provisions, and changes in the license service areas identified on the short-form application on which the applicant intends to bid. Minor amendments include, but are not limited to, the correction of typographical errors and other minor defects not identified as major. An application will be considered to be newly filed if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

(3) Applicants who fail to correct defects in their applications in a timely manner as specified by Public Notice will have their applications dismissed with no opportunity for resubmission.

(c) *Prohibition of collusion.* (1) Except as provided in paragraphs (c)(2), (c)(3) and (c)(4) of this section, after the filing of short-form applications, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the high bidder makes the required down payment, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to§1.2105(a)(2)(viii).

(2) Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before of during an auction, provided such changes do no result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas. Such changes will not be considered major modifications of the application.

(3) After the filing of short-form applications, applicants may make agreements to bid jointly for licenses, provided the parties to the agreement have not applied for licenses in any of the same geographic license areas.

(4) After the filing of short-form applications, a holder of a non- controlling attributable interest in an entity submitting a short-form application may acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for licenses in the same geographic license area, provided that:

(i) the attributable interest holder certifies to the Commission that it has not communicated and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has a consortium or joint bidding arrangement, and which have applied for licenses

in the same geographic license area(s); and

(ii) The arrangements do not result in any change in control of an applicant; or

(iii) When an applicant has withdrawn from the auction, is no longer placing bids and has no further eligibility, a holder of a non-controlling, attributable interest in such an applicant may obtain an ownership interest in or enter into a consortium with another applicant for a license in the same geographic service area, provided that the attributable interest holder certifies to the Commission that it did not communicate with the new applicant prior to the date that the original applicant withdrew from the auction.

(5) Applicants must modify their short-form applications to reflect any changes in ownership or in membership of consortia or joint bidding arrangements.

(6) For purposes of this paragraph:

(i) The term "applicant" shall include all controlling interests in the entity submitting a short-form application to participate in an auction (FCC Form 175), as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application, and all officers and directors of that entity; and

(ii) the term "bids or bidding strategies" shall include capital calls or requests for additional funds in support of bids or bidding strategies.

EXAMPLE: Company A is an applicant in area 1. Company B and Company C each own 10 percent of Company A. Company D is an applicant in area 1, area 2, and area 3. Company C is an applicant in area 3. Without violating the Commission's Rules, Company B can enter into a consortium arrangement with Company D or acquire an ownership interest

in Company D if Company B certifies either (1) that it has communicated with and will communicate neither with Company A or anyone else concerning Company A's bids or bidding strategy, nor with Company C or anyone else concerning Company C's bids or bidding strategy, or (2) that it has not communicated with and will not communicate with Company D or anyone else concerning Company D's bids or bidding strategy.

7. Section 1.2107 is amended by revising paragraphs (b) and (c) to read as follows:

§ 1.2107 Submission of down payment and filing of long-form applications.

*****

(b) Unless otherwise specified by Public Notice, within ten (10) business days after being notified that it is a high bidder on a particular license(s), a high bidder must submit to the Commission's lockbox bank such additional funds (the "down payment") as are necessary to bring its total deposits (not including upfront payments applied to satisfy bid withdrawal or default payments) up to twenty (20) percent of its high bid(s). (In single round sealed bid auctions conducted under§1.2103, however, bidders may be required to submit their down payments with their bids.) Unless otherwise specified by Public Notice, this down payment must be made by wire transfer in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license

or authorization, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable payments. No interest on any down payment will be paid to the bidders.

(c) A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder. Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications. Specific procedures for filing applications will be set out by Public Notice. Beginning January 1, 1999, all long-form applications must be filed electronically. An applicant that fails to submit the required long-form application under this paragraph and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and will be subject to the payments set forth in§1.2104.

*****

8. Section 1.2108 is amended by revising paragraphs (b) and (c) to read as follows:

§ 1.2108 Procedures for filing petitions to deny against long-form applications.

*****

(b) Within a period specified by Public Notice, and after the Commission by public notice announces that long-form applications have been accepted for filing, petitions to deny

such applications may be filed. In all cases, the period for filing petitions to deny shall be no shorter than five (5) days. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

(c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. The time for filing such oppositions shall be at least five (5) days from the filing date for petitions to deny, and the time for filing replies shall be at least five (5) days from the filing date for oppositions. The Commission may grant a license based on any long-form application that has been accepted for filing. The Commission shall in no case grant licenses earlier than seven (7) days following issuance of a public notice announcing long-form applications have been accepted for filing.

*****

9. Section 1.2109 is amended by revising paragraphs (a), (b) and (c) to read as follows:

§ 1.2109 License grant, denial, default, and disqualification.

(a) Unless otherwise specified by Public Notice, auction winners are required to pay the balance of their winning bids in a lump sum within ten (10) business days following the release of a Public Notice establishing the payment deadline. If a winning bidder fails to pay the balance of its winning bids in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five percent of the amount due.

When a winning bidder fails to pay the balance of its winning bid by the late payment deadline, it is considered to be in default on its license(s) and subject to the applicable default payments. Licenses will be awarded upon the full and timely payment of winning bids and any applicable late fees.

(b) If a winning bidder withdraws its bid after the Commission has declared competitive bidding closed or fails to remit the required down payment within ten (10) business days after the Commission has declared competitive bidding closed, the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default payment specified in§1.2104(g)(2). In such event, the Commission, at its discretion, may either re- auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids. The down payment obligations set forth in§1.2107(b) will apply.

(c) A winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment, will be deemed to have defaulted and will be liable for the payment set forth in§1.2104(g)(2). In such event, the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids.

*****

10. Section 1.2110 is revised to read as follows:

§ 1.2110 Designated entities.

*****

(b) ***

(3) Rural telephone companies. A rural telephone company is

any local exchange carrier operating entity to the extent that such entity --

(i) provides common carrier service to any local exchange carrier study area that does not include either

(A) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census, or

(B) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(ii) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(iii) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(iv) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

(4) Affiliate.

(i) An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant if such individual or entity--

(A) directly or indirectly controls or has the power to control the applicant, or

(B) is directly or indirectly controlled by the applicant, or

(C) is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(D) has an "identity of interest" with the applicant.

(ii) Nature of control in determining affiliation.

(A) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to

control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(B) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(C) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(iii) Identity of interest between and among persons. Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or has the power to control a concern, persons with an identity of interest will be treated as though they were one person.

Example. Two shareholders in Corporation Y each have attributable interests in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity in interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

(A) Spousal Affiliation. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(B) Kinship Affiliation. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step- father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are

not closely involved with each other in business matters.

Example. A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation Y is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(iv) Affiliation through stock ownership.

(A) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(B) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(C) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(v) Affiliation arising under stock options, convertible debentures, and agreements to merge. Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and

agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1. If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had come owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(vi) Affiliation under voting trusts.

(A) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(B) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(C) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(vii) Affiliation through common management. Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(viii) Affiliation through common facilities. Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(ix) Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(x) Affiliation under joint venture arrangements.

(A) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts,

property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a point venture.

(B) The parties to a joint venture are considered to be affiliated with each other. Nothing in this subsection shall be construed to define a small business consortium, for purposes of determining status as a designated entity, as a joint venture under attribution standards provided in this section.

(xi) Exclusion from affiliation coverage. For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. s1601 *et seq.*), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section, except that gross revenues derived from gaming activities conducted by affiliate entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. s2701 *et seq.*) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

(c) The Commission may set aside specific licenses for which only eligible designated entities, as specified by the Commission, may bid.

(d) The Commission may permit partitioning of service

areas in particular services for eligible designated entities.

(e) Bidding credits.

(1) The Commission may award bidding credits (i.e., payment discounts) to eligible designated entities. Competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

(2) Size of bidding credits. A winning bidder that qualifies as a small business or a consortium of small businesses may use the following bidding credits corresponding to their respective average gross revenues for the preceding 3 years:

(i) Businesses with average gross revenues for the preceding years 3 years not exceeding $3 million are eligible for bidding credits of 35 percent;

(ii) Businesses with average gross revenues for the preceding years 3 years not exceeding $15 million are eligible for bidding credits of 25 percent; and

(iii) Businesses with average gross revenues for the preceding years 3 years not exceeding $40 million are eligible for bidding credits of 15 percent.

(f) Installment payments. The Commission may permit small businesses (including small businesses owned by women, minorities, or rural telephone companies that qualify as small businesses) and other entities determined to be eligible on a service-specific basis, which are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

(1) Unless otherwise specified by Public Notice, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer in the manner specified in§1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s)

within ten (10) days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay a default payment pursuant to§1.2104(g)(2).

(2) Within ten (10) days of the conditional grant of the license application of a winning bidder eligible for installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. Failure to remit the required payment will make the bidder liable to pay default payments pursuant to§1.2104(g)(2).

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan and that it must execute a promissory note and security agreement as a condition of the installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

(i) impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;

(ii) allow installment payments for the full license term;

(iii) begin with interest-only payments for the first two years; and

(iv) amortize principal and interest over the remaining term of the license.

(4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.

(i) Any licensee that fails to submit payment on an installment obligation will automatically have an additional ninety (90) days in which to submit its required payment without being considered delinquent. Any licensee making its required payment during this period will be assessed a late

payment fee equal to five percent (5%) of the amount of the past due payment. Late fees assessed under this paragraph will accrue on the next business day following the payment due date. Payments made at the close of any grace period will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement." Afterwards, payments will be applied in the following order: late charges, interest charges, principal payments.

(ii) If any licensee fails to make the required payment at the close of the 90-day period set forth in subsection (i) above, the licensee will automatically be provided with a subsequent 90-day grace period. Any licensee making a required payment during this subsequent period will be assessed a late payment fee equal to ten percent (10%) of the amount of the past due payment. Licensees shall not be required to submit any form of request in order to take advantage of the initial 90-day non-delinquency period and subsequent automatic 90-day grace period. All licensees that avail themselves of the automatic grace period must pay the required late fee(s), all interest accrued during the non-delinquency and grace periods, and the appropriate scheduled payment with the first payment made following the conclusion of the grace period.

(iii) If an eligible entity making installment payments is more than one hundred and eighty (180) days delinquent in any payment, it shall be in default.

(iv) Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period will be declared in default, its license will automatically cancel, and will be subject to debt collection procedures.

(g) The Commission may establish different upfront payment requirements for categories of designated entities in competitive bidding rules of particular auctionable services.

(h) The Commission may offer designated entities a combination of the available preferences or additional preferences.

(i) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that effect designated entity status, such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both de facto and de jure control of the entity. Such information must be maintained at the licensees' facilities or by their designated agents for the term of the license in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

(j) The Commission may, on a service-specific basis, permit consortia, each member of which individually meets the eligibility requirements, to qualify for any designated entity provisions.

(k) The Commission may, on a service-specific basis, permit publicly-traded companies that are owned by members of minority groups or women to qualify for any designated entity provisions.

(l) Audits.

(1) Applicants and licensees claiming eligibility under this section shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (FCC Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations

are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding FCC-licensed service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(m) Gross Revenues. Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently completed calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent.

11. Section 1.2111 is amended by revising paragraphs (c) and (d) and adding paragraph (e) to read as follows:

§ 1.2111 Assignment or transfer of control: unjust enrichment.

*****

(c) *Unjust Enrichment Payment: installment financing.*

(1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment

payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval. A licensee's (or other attributable entity's) increased gross revenues or increased total assets due to nonattributable equity investments, debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing eligibility for installment payments.

(3) If a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan under this section, the licensee shall seek Commission approval and must adjust its payment plan to reflect its new eligibility status. A licensee may not switch its payment plan to a more favorable plan.

(d) *Unjust enrichment payment: bidding credits.*

(1) A licensee that utilizes a bidding credit, and that during the initial term seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, will be required to reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license was granted, as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit

obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to make any ownership change that would result in the licensee losing eligibility for a bidding credit (or qualifying for a lower bidding credit), the amount of the bidding credit (or the difference between the bidding credit originally obtained and the bidding credit for which the restructured licensee would qualify), plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer.

(2) Payment Schedule.

(i) The amount of payments made pursuant to paragraph (d)(1) of this section will be reduced over time as follows:

(A) A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible);

(B) A transfer in year 3 of the license term will result in a forfeiture of 75 percent of the value of the bidding credit;

(C) A transfer in year 4 of the license term will result in a forfeiture of 50 percent of the value of the bidding credit;

(D) A transfer in year 5 of the license term will result in a forfeiture of 25 percent of the value of the bidding credit; and

(E) for a transfer in year 6 or thereafter, there will be no payment.

(ii) These payments will have to be paid to the United States Treasury as a condition of approval of the assignment, transfer, or ownership change.

(e) *Unjust Enrichment: Partitioning and Disaggregation.*

(1) Installment Payments. Licensees making installment payments, that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for installment payments, will be subject to the provisions concerning unjust enrichment as set forth in this section.

(2) Bidding Credits. Licensees that received a bidding credit that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for such a bidding credit, will be subject to the provisions concerning unjust enrichment as set forth in this section.

(3) Apportioning Unjust Enrichment Payments. Unjust enrichment payments for partitioned license areas shall be calculated based upon the ratio of the population of the partitioned license area to the overall population of the license area and by utilizing the most recent census data. Unjust enrichment payments for disaggregated spectrum shall be calculated based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the licensee.

12. Section 1.2112 is added to read as follows:

§ 1.2112 Ownership disclosure requirements for short- and long-form applications.

(a) Each application for a license or authorization or for consent to assign or transfer control of a license or authorization shall disclose fully the real party or parties in interest and must include in an exhibit the following information:

(1) A list of any FCC-regulated business 10 percent or more of whose stock, warrants, options or debt securities are

owned by the applicant or an officer, director, attributable stockholder or key management personnel of the applicant. This list must include a description of each such business's principal business and a description of each such business's relationship to the applicant;

(2) A list of any party holding a 10 percent or greater interest in the applicant, including the specific amount of the interest;

(3) A list of any party holding a 10 percent or greater interest in any entity holding or applying for any FCC-regulated business in which a 10 percent or more interest is held by another party which holds a 10 percent or more interest in the applicant (e.g., If company A owns 10 percent of Company B (the applicant) and 10 percent of Company C then Companies A and C must be listed on Company B's application;

(4) A list of the names, addresses, and citizenship of any party holding 10 percent or more of each class of stock, warrants, options or debt securities together with the amount and percentage held;

(5) A list of the names, addresses, and citizenship of all controlling interests of the applicants, as set forth in§1.2110;

(6) In the case of a general partnerships, the name, address and citizenship of each partner, and the share or interest participation in the partnership;

(7) In the case of a limited partnerships, the name, address and citizenship of each limited partner whose interest in the applicant is equal to or greater than 10 percent (as calculated according to the percentage of equity paid in and the percentage of distribution of profits and losses);

(8) In the case of a limited liability corporation, the name, address and citizenship of each of its members; and

(9) A list of all parties holding indirect ownership interests in the applicant, as determined by successive multiplication of the ownership percentages for each link in the vertical

ownership chain, that equals 10 percent or more of the applicant, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated and reported as if it were a 100 percent interest.

(b) In addition to the information required under paragraph (a) of this section, each applicant for a license or authorization claiming status as a small business shall, as an exhibit to its long-form application:

(1) Disclose separately and in the aggregate the gross revenues, computed in accordance with§1.2110, for each of the following: the applicant and its affiliates, the applicant's attributable investors, affiliates of its attributable investors, and, if a consortium of small businesses, the members comprising the consortium;

(2) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of de facto and de jure control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(3) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

13. Section 1.2113 is added to read as follows:

§ 1.2113 Construction prior to grant of application.

Subject to the provisions of this section, applicants for licenses awarded by competitive bidding may construct facilities to provide service prior to grant of their applications, but must not operate such facilities until the FCC grants an authorization. If the conditions stated in this section are not met, applicants must not begin to construct facilities for licenses subject to competitive bidding.

(a) *When applicants may begin construction.* An applicant may begin construction of a facility upon release of the Public Notice listing the post- auction long-form application for that facility as acceptable for filing.

(b) *Notification to stop.* If the FCC for any reason determines that construction should not be started or should be stopped while an application is pending, and so notifies the applicant, orally (followed by written confirmation) or in writing, the applicant must not begin construction or, if construction has begun, must stop construction immediately.

(c) *Assumption of risk.* Applicants that begin construction pursuant to this section before receiving an authorization do so at their own risk and have no recourse against the United States for any losses resulting from:

(1) Applications that are not granted;

(2) Errors or delays in issuing Public Notices;

(3) Having to alter, relocate or dismantle the facility; or

(4) Incurring whatever costs may be necessary to bring the facility into compliance with applicable laws, or FCC rules and orders.

(d) *Conditions.* Except as indicated, all pre-grant construction is subject to the following conditions:

(1) The application does not include a request for a waiver of one or more FCC rules;

(2) For any construction or alteration that would exceed the requirements of §17.7 of this chapter, the licensee has notified the appropriate Regional Office of the Federal Aviation

Administration (FAA Form 7460-1), filed a request for antenna height clearance and obstruction marking and lighting specifications (FCC Form 854) with the FCC, PRB, Support Services Branch, Gettysburg, PA 17325;

(3) The applicant has indicated in the application that the proposed facility would not have a significant environmental effect, in accordance with ss 1.1301 through 1.1319;

(4) Under applicable international agreements and rules in this part, individual coordination of the proposed channel assignment(s) with a foreign administration is not required; and

(5) Any service-specific restrictions not listed herein.

PART 21 - DOMESTIC PUBLIC FIXED RADIO SERVICES

1. The authority citation for Part 21 continues to read as follows:

Authority: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 403, 404, 410, 602, 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552, 554, unless otherwise noted.

2. Section 21.959(a)(2) is revised to read as follows:

§ 21.959 Withdrawal, default and disqualification.

*****

(a) ***

(2) *Default or disqualification after close of auction. See* § 1.2104 (g)(2) of this chapter.

*****

3. Section 21.960(b)(4) and (d)(1) are revised to read as follows:

§ 21.960 Designated entity provisions for MDS.

*****

(b) ***

(4) Conditions and obligations. See § 1.2110(f)(4) of this chapter.

*****

(d) ***

(1) Unjust enrichment. See §1.2111 of this chapter.

*****

PART 24 - PERSONAL COMMUNICATIONS SERVICES

1. The authority citation for Part 24 continues to read as follows:

Authority: 47 U.S.C. Sections 154, 301, 302, 303, and 332, unless otherwise noted.

2. Section 24.304(a)(2) is revised to read as follows:

§ 24.304 Withdrawal, default and disqualification penalties.

(a) ***

(2) *Default or disqualification after close of auction. See* § 1.2104(g)(2) of this chapter.

*****

3. Section 24.309 is amended by revising paragraphs (b) and (f) to read as follows:

§ 24.309 Designated entities

*****

(b) Designated entities will be eligible for certain special narrowband PCS provisions as follows:

(1) Installment payments.

(i) Small businesses, including small businesses owned by members of minority groups and women, will be eligible to pay the full amount of their winning bids on any regional, MTA or BTA license in installments over the term of the license pursuant to the terms set forth in §1.2110(g) of this chapter.

(ii) Businesses owned by members of minority groups and women that are winning bidders for the regional licenses indicated by an (**) in §24.129 may pay the full amount of their winning bids (less the applicable bidding credit and down payment) in installments with

(A) Interest imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent;

(B) Interest-only payments for the first two years; and

(C) Principal and interest payments amortized over the remaining eight years of the license.

(2) Bidding Credits. Businesses owned by member of minority groups and women, including small businesses owned by members of minority groups and women, will be eligible for

a twenty-five (25) percent bidding credit when bidding on the following licenses:

(i) The nationwide licenses on Channel 5, Channel 8 and Channel 11; and

(ii) All MTA licenses on Channel 19, Channel 22, Channel 24; and

(iii) All BTA licenses on Channel 26. This bidding credit will reduce by 25 percent the bid price that businesses owned by members of minority groups and women will be required to pay to obtain a license. Businesses owned by women and/or minorities, including small businesses owned by women and/or minorities will be eligible for a forty (40) percent bidding credit when bidding on all regional licenses on Channel 13 and Channel 17. In §24.129, the licenses that will be eligible for 25 percent bidding credits are indicated by an (*); the licenses that will be eligible for 40 percent bidding credits are indicated by an (**).

*****

(f) *Unjust Enrichment.* Designated entities using installment payments, bidding credits or tax certificates to obtain a narrowband PCS license will be subject to the unjust enrichment provisions contained in §1.2111 of this chapter.

4. Section 24.704(a)(2) is revised to read as follows:

§ 24.704 Withdrawal, default and disqualification penalties.

(a) ***

(2) Default or disqualification after close of auction. See §1.2104(g)(2) of this chapter.

*****

5. Section 24.711 is amended by revising paragraph (b) to read as follows:

§ 24.711 Upfront payments, down payments and installment payments for licenses for frequency Blocks C.

*****

(b) Installment Payments. Each eligible licensee of frequency Block C or F may pay the remaining 90 percent of the net auction price for the license in installment payments pursuant to 1.2110(g) of this Chapter and under the following terms:

(1) For an eligible licensee with gross revenues exceeding $75 million (calculated in accordance with §24.709(a)(2) and (b)) in each of the two preceding years (calculated in accordance with §24.720(f)), interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 3.5 percent; payments shall include both principal and interest amortized over the term of the license.

(2) For an eligible licensee with gross revenues not exceeding $75 million (calculated in accordance with §24.709(a)(2) and (b)) in each of the two preceding years, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first year and payments of interest and principal amortized over the remaining nine years of the license term.

(3) For an eligible licensee that qualifies as a Small business or as a consortium of small businesses, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus

2.5 percent; payments shall include interest only for the first two years and payments of interest and principal amortized over the remaining eight years of the license term.

(4) For an eligible licensee that qualifies as a business owned by members of minority groups and/or women, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first three years and payments of interest and principal amortized over the remaining seven years of the license term.

(5) For an eligible licensee that qualifies as a small business owned by members of minority groups and/or women or as a consortium of small business owned by members of minority groups and/or women, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first six years and payments of interest and principal amortized over the remaining four years of the license term.

(c) Unjust Enrichment. See §1.2111 of this chapter.

6. Section 24.712 is amended by revising paragraph (d) to read as follows:

§ 24.712 Bidding credits for licenses for frequency Blocks C.

*****

(d) *Unjust Enrichment*. See §1.2111 of this chapter.

7. Section 24.716 is amended by revising paragraph (c) and (d) to read as follows:

§ 24.716 Upfront payments, down payments, and installment payments for licenses for frequency Block F.

*****

(c) *Late Installment Payments.* See §1.2110(f)(4) of this chapter.

(d) *Unjust Enrichment.* See §1.2111 of this chapter.

8. Section 24.717 is amended by revising paragraph (c) to read as follows:

§ 24.717 Bidding credits for licenses for frequency Block F.

*****

(c) *Unjust Enrichment.* See §1.2111 of this chapter.

PART 27 - WIRELESS COMMUNICATIONS SERVICE

1. The authority citation for Part 27 continues to read as follows:

Authority: 47 U.S.C. Sections 154, 301, 302, 303, 307, 309 and 332, unless otherwise noted.

2. Section 27.203 is amended by revising paragraph (b) to read as follows:

§ 27.203 Withdrawal, default and disqualification payments.

*****

(b) *Default or disqualification after close of auction.* See §1.2104(g)(2) of this chapter.

2. Section 27.209 is amended by revising paragraph (d) to read as follows:

§ 27.209 Designated entities; bidding credits; unjust enrichment.

*****

(d) *Unjust Enrichment.* See §1.2111 of this chapter.

PART 90 - PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

Authority: Secs. 4, 251-2, 303 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 251-2, 303 309 and 332, unless otherwise noted.

2. Section 90.805(c) is revised to read as follows:

§ 90.805 Withdrawal, default and disqualification payments.

*****

(c) *Default or disqualification after close of auction. See* §1.2104 (g)(2) of this chapter.

*****

3. Section 90.812 (a) and (b) are revised to read as follows:

§ 90.812 Installment payments for licensees won by small businesses.

(a) *Installment Payments. See* §1.2110(f)(4) of this chapter.

(b) *Unjust Enrichment. See* §1.2111(c) of this chapter.

PART 95 - PERSONAL RADIO SERVICES

1. The authority citation for Part 95 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 95.816(c)(6) and (e) are amended to read as follows:

§ 95.816 Competitive bidding proceedings.

*****

(c) ***

(6) Default or disqualification. See §1.2104 (g)(2) of this Chapter.

*****

(e) *Unjust Enrichment.* See §1.2111 of this Chapter.

*****

APPENDIX E
Proposed Rules

Part 1 of Title 47 of the Code of Federal Regulations is proposed to read as follows:

PART 1 - PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: 47 U.S.C. 151, 154, 207, 303 and 309(j), unless otherwise noted.

2. Section 1.2110 is revised to read as follows:

§ 1.2110 Designated entities.

(a) ***

*****

(b) Eligibility for small business provisions.
(1) *Size Attribution.* The *gross revenues* of the applicant (or licensee), its *controlling interests* and their *affiliates* shall be attributed to the applicant and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business under this section. Applicants seeking status as a small business under this section must disclose on its short- and long-form applications, separately and in the aggregate, the *gross revenues* of the applicant (or licensee), its *controlling interests* and their *affiliates.*
(2) *Aggregation of Affiliate Interests.* Persons or entities that

hold interest in an applicant (or licensee) that are *affiliates* of each other or have an identify of interests identified in §1.2110(d) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the requirements of this section.

Example 1. ABC Corp. is owned by individuals, A, B, and C, each having an equal one-third voting interest in ABC Corp. A and B together, with two-thirds of the stock have the power to control ABC Corp. and have an identity of interest. If A & B invest in DE Corp., a broadband PCS applicant for block C, A and B's separate interests in DE Corp. must be aggregated because A and B are to be treated as one person or entity.

Example 2. ABC Corp. has subsidiary BC Corp., of which it holds a controlling 51 percent of the stock. If ABC Corp. and BC Corp., both invest in DE Corp., their separate interests in DE Corp. must be aggregated because ABC Corp. and BC Corp. are affiliates of each other.

(3) *Exceptions.*

(i) Small business consortia. Where an applicant (or licensee) is a *consortium of small businesses,* the *gross revenues* and *total assets* of each small business consortium member shall not be aggregated. Each small business consortium member must constitute a separate and distinct legal entity to qualify.

(ii) Applicants without identifiable controlling interests. Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(c) Definitions.

(1) Small businesses. The Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.

(2) Controlling interest.

(i) For purposes of this section, controlling interest includes individuals or entities with both *de jure* and *de facto* control of the applicant. *De jure* control is greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, the general partner. *De facto* control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains de facto control of the applicant:

(A) the entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(B) the entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(C) the entity plays an integral role in management decisions.

(ii) Calculation of Certain Interests.

(A) Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(B) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified below.

(C) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and, to any person who has the right to revoke the trust at will or to replace

the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(D) Non-voting stock shall be attributed as an interest in the issuing entity if in excess of the amounts set forth in paragraph (d)(2)(ii)(B) of this section.

(E) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in the percentage of distribution of profits and losses.

(F) Officers and directors of an entity shall be considered to have an attributable interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have an attributable interest in the licensee or applicant.

(G) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(H) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have an attributable interest in such applicant or licensee if such person or its affiliate pursuant to paragraph (c)(5) of this subsection, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence

(i) The nature or types of services offered by such an applicant or licensee;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(I) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have an attributable interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

(i) The nature or types of services offered by such an applicant or licensee;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(3) Businesses owned by members of minority groups and/or women. Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least greater than 50 percent equity ownership and, in the case of a corporate applicant, have a greater than 50 percent voting interest. For applicants that are partnerships, every general partner must be either a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non- controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of

the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. The term minority includes individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction.

*****

Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Third Report and Order* and Second Further Notice of Proposed Rule Making

STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH

By today's action, the Commission has consolidated and streamlined its spectrum auction rules. At the same time, and in order to provide existing licensees and future bidders additional regulatory certainty and fairness, the Commission has endeavored to harmonize its auction rules among the various spectrum-based services to which these rules apply. I believe the benefits of these changes will outweigh their costs. Accordingly, I support the item.

We did not, however, undertake the more difficult task of revamping our entire auction system. In my view, this proceeding (the latest round of which began nearly a year ago) should have elicited more thorough public comment on how the system could be improved.

For example, with a more complete record, we could have used this opportunity to permanently discard rules -- such as our ill-fated installment payment system -- that thrust the Commission into the role of unwitting (and unqualified) banker to our licensees. I find it incredibly inefficient and unsound policy for a federal government agency, especially one with no banking expertise, to substitute itself and its judgments for those of private financial institutions and markets.

In the end, however, we have respected the requirements of the law and, where appropriate, we have recognized the critically important role of all designated entities under Section 309(j) of

the Act, including small businesses and rural telephone companies, in our economy and society. I believe that, within the bounds of the law, we must be faithful to companies such as these, just as companies in competitive markets must be faithful to their customers. As regulators, the FCC's fidelity can be measured in part by how little burden we force industry and consumers to shoulder. By adding certainty and fairness to our auction rules, today we have lifted some part of the burden of regulation.

Statement of Commissioner Gloria Tristani on the Adoption the Third Report and Order and Second Further Proposed Rulemaking on the Amendment of the Commission's Part 1 Auction Rules

It is fitting that we streamline, simplify and standardize our auction rules. These rules reduce the burden for applicants and licensees by adopting, where appropriate, uniform rules that will apply regardless of the service to be provided. But we also retain the flexibility to tailor some provisions to individual services. The guidance these rules provide will serve the public and the Commission alike by easing, and speeding, the auctions rulemaking process.

I wish to note a vital issue that remains. Today we affirm our commitment to eliminate barriers to entry and to ensure that minorities and women have the opportunity to participate in the provision of spectrum-based services. Under Section 257, we have already initiated several studies in the broadcast area, and we will soon initiate a study concerning participation and barriers to entry in the auctions context.

To date, minority and women-owned businesses have benefitted from the small business provisions we have offered -- installment payments, bidding credits and entrepreneurs blocks. Thus, of the more than four thousand licenses awarded by auction, approximately 11 percent have been awarded to minority- owned businesses and 11 percent to women -owned businesses. However, in light of our decision today to suspend use of installment payments for the foreseeable future, we must pay attention to the unique obstacles facing minorities and women as they seek to participate in the telecommunications revolution. In the further notice, we seek comment on these

obstacles and on what remedies we might offer to facilitate widespread participation. I will be especially interested in the comments and proposals we receive to fulfill our statutory obligations.

Federal Communications Commission FCC 98-46

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
	)
Amendment of Commission's	) WT Docket No. 97-82
Rules Regarding Installment	)
Payment Financing For Personal	)
Communications Services (PCS)	)
Licensees	)

ORDER ON RECONSIDERATION OF THE SECOND REPORT AND ORDER

Adopted: March 23, 1998 Released: March 24, 1998

By the Commission: Commissioners Ness and Powell concurring in part, dissenting in part, and issuing separate statements; Commissioner Tristani issuing a statement.

I. INTRODUCTION

1. On September 25, 1997, the Commission adopted a *Second Report and Order* and *Further Notice of Proposed Rule Making* ("*Second Report and Order*" and "*Further Notice*") establishing March 31, 1998, as the deadline for broadband Personal Communications Services ("PCS") C

and F block licensees to resume installment payments.[1] In addition, the Commission offered C block licensees a choice of three alternative payment options in lieu of resuming payments under the terms of the original payment plan. The three options were intended to provide limited relief to C block licensees experiencing financial difficulties, while preserving the fairness and integrity of the auction process.

2. In response to the rulings in the *Second Report and Order*, we received 37 petitions for reconsideration, 17 oppositions to the petitions, 16 replies to the oppositions, and 38 *ex parte* filings.[2] After considering the arguments raised in those filings, we generally affirm the framework established in the *Second Report and Order*, but we make a few modifications designed to provide C block licensees greater flexibility in making their elections. We believe that these changes improve upon the *Second Report and Order* by allowing more existing licensees to adjust their business plans and remain in the wireless market to compete against other providers, while also providing for the return of spectrum to the Commission so that other entrepreneurs will have opportunities to obtain broadband PCS licenses in a reauction. In a forthcoming Order, we will address comments

---

[1]Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436 (1997).

[2] A list of the parties that filed pleadings in response to the *Second Report and Order*, and the abbreviations used to refer to such parties, is attached as Appendix A. Although CX Systems and Dorne & Margolin filed petitions for reconsideration after the filing deadline, we will accept their filings as *ex parte* filings. For the sake of consistency, we refer to filings as oppositions if they were filed at the time oppositions were due, even if they are supportive of arguments raised in the petitions.

filed in response to the *Further Notice*, which covers rules for the reauction of returned C block licenses.

II. BACKGROUND

3. Consistent with Congress' mandate to promote the participation of small businesses and other "designated entities" in the provision of spectrum-based services,[3] the Commission limited eligibility in the initial C block auctions to entrepreneurs and small businesses. The C block auction concluded on May 6, 1996, and the subsequent reauction of defaulted licenses concluded on July 16, 1996, with a total of 90 bidders winning 493 licenses. The winning bidders were permitted to pay 90 percent of their net bid price over a period of ten years, paying only interest for the first six years and paying both interest and principal for the remaining four years.[4]

4. On March 31, 1997, the Wireless Telecommunications Bureau (the "Bureau") suspended the deadline for payment of installment payments for all C block licensees.[5] The suspension was implemented in response to a joint request from several C block licensees seeking modification of their installment payment obligations and to allow more time for discussions with other federal agencies concerning "the transfer of responsibilities for certain debt functions related to

---

[3] Communications Act of 1934, as amended ("Communications Act") § 309(j)(4)(D), 47 U.S.C. § 309(j)(4)(D).

[4] *See* 47 C.F.R. § 24.711(b)(3). The net bid price is equal to the winning bid less any bidding credit for which the licensee was eligible. *See* 47 C.F.R. § 24.712.

[5] *See* Installment Payments for PCS Licenses, *Order*, 12 FCC Rcd 17,325 (WTB 1997).

[the installment payment] program."[6] On April 28, 1997, the Bureau extended the suspension to F block licensees.[7] As mentioned above, on September 25, 1997, the Commission ended this suspension and established March 31, 1998, as the deadline for C and F block licensees to resume their installment payments.[8]

5. After reviewing various proposals for relief, the Commission decided in the *Second Report and Order* to allow each C block licensee to elect one of three options for all of its licenses in lieu of continuing payments under the licensee's original installment payment plan.[9] Each of the three options -- disaggregation, amnesty, and prepayment -- was intended to provide limited relief to financially troubled licensees without harming the integrity of the auction process.[10] The Commission determined that further relief for F block licensees was unnecessary.[11]

6. In the *Second Report and Order*, the Commission required C block licensees to file a written election notice on or before January 15, 1998, specifying whether they would resume payments under the terms of the original installment payment plan or would proceed under one of the alternative

---

[6] *Id.*, 12 FCC Rcd at 17,325 para. 1.

[7] *See* "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," *Public Notice*, DA 97-883 (released April 28, 1997) at 2.

[8] *Second Report and Order*, 12 FCC Rcd at 16,448 para. 21.

[9] *See id.*, 12 FCC Rcd at 16,444-46 paras. 15-17.

[10] *See id.*, 12 FCC Rcd at 16,437-38 para. 2.

[11] *Id.*, 12 FCC Rcd at 16,447 para. 20.

options.[12] On January 7, 1998, we postponed the election date until February 26, 1998, in order to resolve issues raised on reconsideration before licensees submitted their elections.[13] In addition, we announced that the reauction of spectrum surrendered by C block licensees pursuant to their elections would begin on September 29, 1998.[14] On February 24, 1998, we revised both the February 26, 1998, election date and the March 31, 1998, payment resumption date.[15] We changed the election date to 60 days from publication of this Order in the *Federal Register* and the payment resumption date to at least 30 days after the new election date.[16]

III. OVERVIEW

7. The Commission determined in the *Second Report and Order* that it would serve the public interest to provide a variety of relief mechanisms to assist C block licensees that were experiencing difficulties in meeting the financial obligations under the installment payment plan. The Commission believed the "extraordinary procedures" it adopted to offer relief to C block licensees appropriately

---

[12] *Id.*, 12 FCC Rcd at 16,470 para. 70.

[13] Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order*, FCC 98-2 (released January 7, 1998) at para. 2 ("*Election Date Order I*").

[14] *Id.* at para. 3.

[15] Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order*, FCC 98-28 (released February 24, 1998) ("*Election Date Order II*").

[16] *Id.* at paras. 2-3. The Bureau will issue a public notice setting forth the procedures for filing an election notice.

balanced a number of important policy goals.[17] In formulating a resolution to the complex issues involved, one of the Commission's foremost objectives was to preserve the integrity of the auction process and to maintain public confidence in the stability of the Commission's auction rules.[18] The Commission also believed it was essential to ensure fair and impartial treatment for all auction participants, including winning bidders, unsuccessful bidders, and licensees in competing services.[19] At the same time, the Commission was cognizant of its statutory mandate to promote economic opportunity and to encourage broad participation in the provision of spectrum-based services.[20] In addition, the Commission attempted to implement a workable solution in a timely manner that would facilitate rapid introduction of service to the public without further regulatory or marketplace delay.[21]

8. We believe the approach adopted in the *Second Report and Order* largely accomplishes these objectives. The relief provided C block licensees will speed deployment of service to the public by easing lenders' and investors' concerns regarding regulatory uncertainty and by potentially making more capital available for investment and growth. By

---

[17] *Second Report and Order*, 12 FCC Rcd at 16,437-38 para. 2.

[18] *Id.*, 12 FCC Rcd at 16,437-38 paras. 2-3. *But see* MFRI Reply at 2-6 (the real solution to maintaining auction integrity is to resolve bid signaling practices; a modest adjustment to the installment payment plan is not related to auction integrity); Hyundai Reply at 2-3 (auction integrity is not a sufficient basis for denying relief).

[19] *Second Report and Order*, 12 FCC Rcd at 16,437-38 paras. 2-3.

[20] *Id.*, 12 FCC Rcd at 16,437-38 para. 2 (citing Communications Act § 309(j)(3)(A), (B), 47 U.S.C. § 309(j)(3)(A), (B)).

[21] *Id.*, 12 FCC Rcd at 16,437-39 paras. 2, 4-5.

facilitating the provision of service to consumers, the Commission advanced Congress' objective to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public."[22] In addition, the mechanisms the Commission created to help these small businesses remain viable competitors in the marketplace furthered its statutory mandate to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses . . . ."[23] However, out of fairness to bidders that withdrew from the auction and to maintain the integrity of the auction process, the Commission rejected proposals that would have significantly altered the amounts paid for individual licenses. Mindful of the effect its decision would have on future auctions, the Commission opted for a more modest approach.

9. Although we believe the decision adopted in the *Second Report and Order* largely should be maintained, we believe that certain aspects of the adopted approach were overly restrictive. A number of petitioners claim that the options presented by the Commission do not provide economically viable alternatives for financially troubled licensees.[24]

---

[22] Communications Act § 309(j)(3)(A), 47 U.S.C. § 309(j)(3)(A).

[23] Communications Act § 309(j)(3)(B), 47 U.S.C. § 309(j)(3)(B).

[24] *See, e.g.*, New Wave Petition at 2 (the presented options are not economically viable for numerous licensees and the punitive damages levied will impede network build-out and possibly lead to widespread bankruptcies); GWI Petition at 2 (a major reduction in the license debt is the only commercially viable way for many small businesses to obtain necessary funding); One Stop Wireless Petition at 1 (the options offered do not work

Indeed, a frequent complaint expressed throughout the numerous petitions is that the available options fall short of providing meaningful relief. We also received several letters from members of Congress asking that we take additional measures to assist C block licensees.[25]

10. After reviewing the extensive record on reconsideration, we believe that a radical departure from the *Second Report and Order* is not warranted.[26] The *Second Report and Order*

---

for C block licensees); OnQue Petition at 1 (the Commission's options do not provide any stability); Omnipoint Petition at 13 (without further clarification of the Commission's position on bankruptcy, bankruptcy may be a licensee's lowest risk alternative); RFW Reply at 3 (the Commission's punitive provisions likely will increase the number of bankruptcy filings).

[25] The Honorable J. Robert Kerrey *ex parte* filing at 1; The Honorable Barbara Boxer *ex parte* filing at 1-2; The Honorable Albert R. Wynn *ex parte* filing at 1-2; The Honorable Xavier Becerra *ex parte* filing at 1-2; Members of the Congressional Hispanic Caucus *ex parte* filing at 2; The Honorable Richard H. Bryan and The Honorable Harry Reid *ex parte* filing at 1; *see also* The Honorable Sue W. Kelly *ex parte* filing at 1; The Honorable Thomas Daschle *ex parte* filing at 1; The Honorable Gary L. Ackerman *ex parte* filing at 1.

[26] *See* AT&T Opposition at 2 (the options offered in the *Second Report and Order* provide sufficient financial relief without undermining the integrity of the auction process); PrimeCo Opposition at 5 ("the *Second Report and Order* reflects a reasonable balancing of Congress' statutory objectives and marketplace considerations and should be affirmed"); Fidelity Capital Opposition at 5 (the *Second Report and Order* "presents a fair and balanced plan to provide relief to struggling C-Block licensees, while not disadvantaging licensees who are successfully building out their systems"); Northcoast Opposition at 4 (significant change would be fundamentally unfair to licensees that have honored their financial commitments); AirGate Opposition at 5-6 (the financing options available to C block licensees, including the Commission's original installment payment plan, are more generous than financing offered to any participants in other auctions); Frontier Reply at 2 (significant relief would be unfair to bidders that were unsuccessful in the auction process).

created an innovative solution to requests from C block licensees needing financial relief. Certain requirements, however, may constrain many C block licensees from making use of the relief measures offered. We believe that, with a few adjustments to the adopted approach, we can better effectuate the Commission's intent to provide C block licensees a limited measure of relief under the unique but varied circumstances presented. We therefore will leave the basic framework intact, but we will alter it slightly to allow licensees to be more flexible in making their elections for licenses in different geographic areas, to use more of the down payments already on deposit, and to be more flexible in the use of those down payments. We believe that this approach improves upon the *Second Report and Order* by better enabling C block licensees to remain participants in the wireless market, which will promote competition and the delivery of new services to the public.

11. First, we will eliminate the requirement that a licensee must make the same election for all its licenses. Instead, a licensee may make different elections for the different Major Trading Areas ("MTAs") in which it holds licenses. The election made for an MTA will apply to every Basic Trading Area ("BTA") license held by the licensee in that MTA. As under the *Second Report and Order*, the possible elections include resumption of payments, amnesty, prepayment, or disaggregation. As part of the modifications to the adopted approach, we will also permit a combination of disaggregation and prepayment. Resumption of payments and prepayment of 30 MHz licenses will remain essentially the same as in the *Second Report and Order*. We will, however, modify the amnesty and disaggregation options, as follows.

12. Under the revised amnesty option, a licensee may return

to the Commission licenses in any MTA it wishes so long as it returns all its BTA licenses within the MTA. The entire outstanding debt on the returned licenses will be forgiven. For each MTA that is returned, the licensee will have two choices, and its decision will apply to all its BTA licenses within the MTA. If the licensee wishes to bid on those licenses it returns in the reauction, none of the down payment associated with such licenses will be available, consistent with the *Second Report and Order*. Alternatively, the licensee may opt to forgo the opportunity to bid on its returned licenses in exchange for a credit of 70 percent of the down payment made on the licenses. This credit may be used to prepay the entire principal owed for a retained MTA with 30 MHz licenses. This, essentially, is the prepayment option as adopted in the *Second Report and Order*. Alternatively, we permit a combination of prepayment and disaggregation, so that the licensee may prepay the entire principal owed for the retained 15 MHz licenses of an MTA that has been disaggregated.

13. As under the *Second Report and Order*, a licensee that disaggregates an MTA may continue making installment payments on the retained spectrum. However, for each disaggregated license, the licensee will now receive credit for 40 percent of the down payment applicable to the returned 15 MHz of spectrum. This 40 percent credit may be applied only to the 15 MHz of spectrum retained from the same license. It may be used to reduce the principal outstanding and/or to pay "Suspension Interest" (i.e., all unpaid simple interest accruing from the date of license grant through March 31, 1998). Because the down payment applicable to the retained spectrum will be considered the down payment for that spectrum and the licensee thus retains 100 percent of that portion of the down payment, the licensee in effect receives a

blended credit of 70 percent of the total down payment made on the full 30 MHz license.

14. Alternatively, under our modified approach, a licensee will be allowed to prepay a disaggregated MTA. In that case, the licensee will receive credit for 70 percent of the down payment applicable to the returned spectrum. Because the licensee retains 100 percent of the portion of the down payment associated with the retained portion of the license, the licensee in effect receives a blended credit of 85 percent of the total down payment. The 70 percent credit may be applied toward the prepayment of a retained MTA with 30 MHz licenses (so long as the retained 15 MHz license is prepaid) and/or toward the prepayment of the retained 15 MHz licenses of an MTA that has been disaggregated.

15. In addition, we adopt the following limited modifications: (1) we extend to 90 days the 60-day non-delinquency period for payments not made on the payment resumption date, and we impose a 5 percent late payment fee for payments made within this 90-day non-delinquency period; (2) we instruct the Bureau to modify the payment schedules of all C and F block licensees so that all payments will be due on the same date; (3) we eliminate the build-out exception to the amnesty option because it is rendered moot by our modified approach; and (4) for purposes of the rule that a licensee electing prepayment that does not have sufficient funds to prepay all its BTA licenses within an MTA may prepay only the BTA licenses within the MTA that it can afford, we clarify that a licensee can "afford" as many BTA licenses within an MTA that it can prepay using only the amount of credit available to the licensee for prepayment.

IV. MTA-BY-MTA ELECTIONS

A. Background

16. Under the *Second Report and Order*, a licensee was not permitted to make more than one election. Therefore, whatever election was chosen would apply to all licenses held by the licensee. For practical purposes, there was a limited mixing of options to the extent that payments would have to be resumed under the terms of the original installment plan with respect to any licenses not halved under the disaggregation option and any licenses retained under the build-out exception to the amnesty option. Licensees were precluded, however, from forming any other combinations among the options. For example, a licensee could not prepay some licenses and disaggregate others.

B. Discussion

17. By offering a menu of options, the Commission attempted to accommodate the fact that different licensees face different circumstances. However, the requirement that a licensee make the same election for all its licenses failed to account for the situation where a licensee faces different circumstances in its different license areas. We believe that licensees will be able to take better advantage of the varied benefits of the options if they are allowed to make different elections for the different areas in which they hold licenses. Therefore, we eliminate the requirement that a licensee must make the same election for all its licenses. We agree with NextWave and other parties that instead we should allow a licensee to make one election for each MTA in which it holds

licenses.[27] In other words, the same election must be applied to each BTA license held in a given MTA, but different elections may be selected for different MTAs. For this purpose, the available elections that may be applied to an MTA are the resumption of payments under the existing installment payment plan, amnesty, prepayment, disaggregation, and a combination of disaggregation and prepayment. These elections are discussed in detail below.

18. We believe the MTA is the appropriate unit for making an election for similar reasons that the Commission previously determined it was an appropriate cut-off point.[28] We do not believe licensees should be permitted to make elections on a BTA-by-BTA basis. As the Commission stated in the *Second Report and Order*, allowing options to be applied at the BTA level would threaten the interdependency of licenses and would limit the potential for aggregation of licenses within an MTA.[29] It also would permit licensees to "cherry-pick" the most desirable markets within an area.[30] The return of only the less desirable markets would discourage participation in the reauction and could substantially delay the deployment of service to those areas. This danger does not exist at the MTA level because MTAs

---

[27] NextWave Reply at 8; *ex parte* letter jointly filed by 43 companies on February 20, 1998, at 1. We also received letters from members of Congress generally supporting greater flexibility regarding licensees' ability to choose which licenses may be returned. The Honorable Xavier Becerra *ex parte* filing at 1; Members of the Congressional Hispanic Caucus *ex parte* filing at 2.

[28] *Second Report and Order*, 12 FCC Rcd at 16,455, 16,458, 16,463-64, 16,469 paras. 38, 44, 57, 67.

[29] *Id.*, 12 FCC Rcd at 16,463, 16,469 paras. 56, 67.

[30] *Id.*, 12 FCC Rcd at 16,455, 16,463-64, 16,469 paras. 38, 56-57, 67.

are large enough market areas that the value of an MTA would not be diminished if it was surrendered and its neighboring MTAs were not.

19. By allowing elections to be made on an MTA-by-MTA basis, we enable licensees to make election decisions that are not based solely on the elements of each option, but rather on their own business plans and financial situation. For example, a licensee may be successfully financing its license holdings on the east coast but experiencing difficulties in financing its west coast holdings. Under the approach adopted in the *Second Report and Order*, the prepayment option was the only means by which the licensee could return its west coast licenses while keeping its cast coast licenses.[31] We believe that the decision to retain or surrender licenses in an MTA should depend on the particular circumstances surrounding those licenses. The decision should not be driven by the terms of the options or by unrelated circumstances in other areas, which might dictate a universal election unsuitable for the licenses in that MTA.

20. Further, we believe that MTA-by-MTA elections will promote rapid deployment of service to the public.[32] Licensees will have more opportunity to localize their business plans by surrendering licenses in markets where success now seems unlikely due to financial difficulties. As a result, they will be able to focus on providing service in those markets where they have retained their licenses. In addition, the surrendered licenses presumably will be reauctioned to

[31] Note, however, that under the build-out exception to the original amnesty option, the licensee could retain any licenses that satisfied the build-out requirement. *Id.*, 12 FCC Rcd at 16,463-64 para. 57.

[32] See Communications Act § 309(j)(3)(A), 47 U.S.C. § 309(j)(3)(A).

entities better positioned to provide service in those license areas. Indeed, we anticipate that MTA-by-MTA elections will produce a more robust and competitive reauction. We expect more licenses to be returned for reauction because a licensee choosing disaggregation or resumption will now be free to surrender licenses it was reluctant to keep, but was forced to do so under the previous terms of those elections. Allowing those licenses to be reauctioned to entities that are more committed, or better able, to serve those markets will stimulate competition and benefit consumers. Furthermore, permitting elections on an MTA-by-MTA basis will not undermine the integrity of the auction process because licensees still must pay the full amount of their licenses.

V. RESUMPTION OF PAYMENTS

A. Background

21. In the *Second Report and Order*, the Commission rescinded, effective March 31, 1998, the Bureau's prior suspension of the deadline for all broadband PCS C block and F block installment payments.[33] All payments due and owing after March 31, 1998, were to be made in accordance with the terms of each licensee's Note, associated Security Agreement, and the Commission's Orders and regulations.[34] The Commission stated that all rules regarding installment payments and defaults for the broadband PCS C and F blocks would remain in effect, except as modified by the *Second Report and Order*.[35] The Commission ruled that any licensee

[33] *Second Report and Order*, 12 FCC Rcd at 16,449-50 para. 25.

[34] *Id.*

[35] *Id.*

that failed to remit the payment due on March 31, 1998, and remained delinquent for more than 60 days (in other words, failed to make the March 31, 1998, payment on or before May 30, 1998), would be in default on its license. As the Commission noted, the 60-day non-delinquency period was an exception to existing Commission rules that provide for an automatic 90-day non-delinquency period for each installment payment.[36]

22. The Commission directed in the *Second Report and Order* that Suspension Interest would become due and payable over a two-year period, beginning on March 31, 1998, on which date broadband PCS C and F block licensees would be required to submit one-eighth of the Suspension Interest.[37] After March 31, 1998, one-eighth of the Suspension Interest was to be paid along with each regular installment payment on each subsequent payment due date until the Suspension Interest had been fully paid.[38] Payment due dates would conform to those indicated in the Notes executed by the licensees.[39]

23. On February 24, 1998, we issued an order revising the

---

[36] *Id. See also* 47 C.F.R. § 1.2110(f)(4)(i).

[37] *Second Report and Order*, 12 FCC Rcd at 16,449-51 paras. 25-27. For those C block licensees that retained licenses under the disaggregation option or under the build-out exception to the amnesty option, the Suspension Interest would be adjusted accordingly. C block licensees that elected the prepayment option or surrendered all licenses under the amnesty option would not be charged Suspension Interest.

[38] *Id.*

[39] *Id.* We previously provided specific examples of the schedule for paying the Suspension Interest. *See id.*, 12 FCC Rcd at 16,450-51 para. 27 and nn.53-54.

March 31, 1998, payment resumption date.[40] We stated that the payment resumption date would be at least 30 days after the date on which C block licensees must file a written election notice specifying their decision to resume payments under the terms of the original installment payment plan or to proceed under one of the alternative options. The election date was postponed in the same February 24, 1998, order to 60 days after publication of this reconsideration order in the *Federal Register*.[41] As we stated in that order, the Bureau will announce the specific dates for election and payment resumption as soon as this reconsideration order is published.[42]

B. Discussion

24. By the time they must resume making payments, C and F block licensees will have enjoyed a respite from their payment obligations substantially longer than one year. Several parties, however, seek a much longer deferral of the payment deadline.[43] We do not find their requests persuasive.

---

[40] *Election Date Order II.*

[41] *Id.* The election date had been postponed once before on January 7, 1998. *Election Date Order I.*

[42] *Election Date Order II* at para. 3.

[43] *See* Alpine Petition at 13 and Alpine Reply at 8-9 (suggesting a moratorium on interest payments for up to five years); Cellexis Petition at 1, 5 and Cellexis Reply at 2-5 (supporting an earlier proposal by the U.S. Small Business Administration ("SBA") for a five-year deferral); McBride Petition at 5 (proposing elimination of all payments for the first seven years, with no interest on the debt for the first five years); Meretel Petition at 1-2 (asking the Commission to reconsider the deferral issue); MFRI Petition at 3 (endorsing a suspension of all payments until the end of the fifth year of the license, with the balance of principal and interest paid over the remaining five years of the license); NextWave Petition at 4-5, 22-25

No matter what deadline we establish, it is inevitablle that some licensees will seek more time to pay. As stated in the *Second Report and Order*, a more extensive deferral would be unfair to unsuccessful bidders that might not have withdrawn from the auction had they known of deferral opportunities.[44] The Commission properly rejected a further deferral because it did "not wish to adopt temporary solutions such as those that might only postpone these difficulties and further prolong uncertainty."[45] We agree with parties that urge the Commission to reject any attempts to extend further

---

(proposing a "modest deferral" to facilitate network deployment, while requiring payment in full with accrued interest within the existing license term); Next Wave Reply at 5-8 (proposing resumption of payments phased in on a graduated basis for first three years); New Wave Petition at 1, 2 (requesting a deferral spanning a period of five or more years); Northern Michigan Petition at 5-6 (indicating a preference for an additional two-year suspension); One Stop Wireless Petition at 2-3 (seeking consideration of SBA proposal for short-term deferral combined with extension of five-year construction deadline, or long-term deferral with no change in construction deadline); OnQue Petition at 2 (supporting a two-year deferral from December 31, 1996); RFW Petition at 1, 4-5 (recommending a five-year deferral of principal and interest payments); Urban Communicators Petition at ii, 2, 5-7 (asking for an extension of the suspension until March 31, 1999, and two additional one-year deferrals, so long as licensees make certain demonstrations of financial ability and substantial construction progress and pay an interest rate increased by 0.5 percent for the deferral period); CONXUS Opposition at 6 (agreeing with NextWave and Alpine); Duluth PCS, et al. Opposition at 5 (advocating a five-year deferral of payment obligations); and Polycell Opposition at 5 (same as Duluth PCS, et al.). See also The Honorable Barbara Boxer *ex parte* filing at 1 (asking the Commission to consider a "limited deferral"); The Honorable Albert R. Wynn *ex parte* filing at 1 (requesting that the payment resumption date be extended by six months).

[44] *Second Report and Order*, 12 FCC Rcd at 16,446-47 para. 18.

[45] *Id.*

the suspension of payments.[46]

25. Although we will not grant the lengthy postponement requested by some parties, we will provide modest relief by extending the non-delinquency period for licensees that fail to meet the payment resumption deadline. In response to Urban Communicators' request, we will extend to 90 days the automatic 60-day non-delinquency period applicable to payments due on the payment resumption date.[47] As mentioned above, the Commission's rules allow a 90-day non- delinquency period for all other installment payments.[48] Although we stated in the *Second Report and Order* that a shorter non-delinquency period was justified in light of the one-year payment suspension,[49] we now believe that it is preferable to make the length of that non-delinquency period consistent with our rule for all other payments. We are providing this 30-day extension to assist licensees that are experiencing last-minute delays in raising capital. We believe that by offering this additional time, we will help these licensees complete their fundraising efforts.

---

[46] *See, e.g.*, Antigone/Devco Opposition at 6 ("The public treasury is harmed by every deferral of payments."); AirGate Opposition at 10 ("as time elapses, the prospect for repayment diminishes"); Sprint Opposition at 5 ("further delay puts C block licensees at a competitive disadvantage, making attracting investment capital difficult; creates a cloud of uncertainty over the wireless sector; and unjustly enriches defaulting licensees by affording them financing opportunities not available to those who in good faith fulfilled their payment obligations"); Northcoast Opposition at 3-4 ("additional C Block installment payment rule changes would be bad policy because it would create uncertainty as to how the Commission will handle situations of licensee default that occur outside of the C Block context").

[47] Urban Communicators Petition at 7-8.

[48] 47 C.F.R. § 1.2110(f)(4)(i).

[49] *Second Report and Order*, 12 FCC Rcd at 16,449-50 para. 25.

26. Consistent with our rule for all other payments, payments made within this 90-day non-delinquency period will be assessed the 5 percent late payment fee that we recently adopted.[50] However, in light of the more than one-year suspension and this expanded non-delinquency period, we believe that a subsequent grace period is not warranted. Therefore, there will be no subsequent automatic grace period for licensees that fail to make payment within the 90-day non-delinquency period.[51] Subsequent payments, due after the initial resumption payment, will be subject to the rules adopted in the *Part I Third Report and Order*.

27. Under this plan, the Suspension Period (as defined in the *Second Report and Order*) will still end on March 31, 1998.[52] All interest accrued from the date of license grant through March 31, 1998, (i.e., Suspension Interest) will continue to be payable over eight equal payments. Interest accrued from April 1, 1998, through the payment resumption date will be due on the payment resumption date, in addition to one-eighth of the Suspension Interest. We believe that this plan will require licensees continuing under an installment

---

[50] *See* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, FCC 97-413 (released December 31, 1997) at para. 106 ("*Part I Third Report and Order*") (reconsideration pending). *See* 47 C.F.R. § 1.2110(f)(4)(i).

[51] *See Part I Third Report and Order* at para. 106; 47 C.F.R. § 1.2110(f)(4)(ii). *But see* The Honorable Albert R. Wynn *ex parte* filing at 1 (the Commission's newly adopted 180-day payment period should apply to C block licensees).

[52] *See Second Report and Order*, 12 FCC Rcd at 16,448 para. 21 (the Suspension Period was defined as "the period beginning with the date on which each license was conditionally granted through and including March 31, 1998").

payment plan, either through resumption or disaggregation, to demonstrate their financial viability by making a reasonable payment on the payment resumption date. This payment will evidence the ability of licensees to access the capital necessary to both service their government debt obligations and provide service to the public. In addition, we instruct the Bureau to modify the payment schedule so that all C and F block installment payments will be due on a quarterly basis, beginning on the payment resumption date.

28. We reject Urban Communicators' suggestion that Suspension Interest be forgiven, as well as its alternative proposals that Suspension Interest be paid either in a balloon at the end of the ten-year installment payment period or over six years in conjunction with other interest payments.[53] Because the Commission already has provided sufficient relief by granting the one-year suspension, we will neither forgive nor defer payment of the Suspension Interest. The Commission has accommodated licensees sufficiently by allowing payment of the Suspension Interest over eight equal payments.

29. We also reject requests from parties seeking a deviation from the payment schedule and from amounts established by the licensees' Notes.[54] We are providing all C block licensees

---

[53] Urban Communicators Petition at 8-9.

[54] Alpine asks that: (1) principal and interest payments be spread over a period of 20 years; (2) principal and interest payments be paid annually, rather than quarterly; and (3) the accrual of interest be suspended from the date of license grant until 90 days after the issuance of reauctioned licenses. Alpine Petition at 12-13, n.6; *see also* Alpine Reply at 8. Alpine also argues that licenses awarded in the original C block auction have diminished in value and, on that basis, urges the Commission to reduce the price for each "so affected" license by 15 percent per year until 90 days after the grant of

with an array of alternative payment options, designed to accommodate licensees' various needs. These options were developed and are now being modified in an effort to balance complex and competing interests, with the recognition that it is impossible to devise alternatives that satisfy every entity with an interest in this proceeding. The record before us does not provide a sufficient basis for creating additional payment choices; indeed, there is opposition to our doing so.[55] Moreover, as explained above and in the *Second Report and Order*, the Commission purposefully adopted an approach that does not significantly alter the amounts paid for

---

reauctioned licenses. Alpine Petition at 13 n.6. DiGiPH similarly maintains that reauction will result in lower prices for licenses than at the original auction and therefore requests that the Commission reduce the debt of original licensees in an amount equal to the average reduction in cost for licenses sold at reauction. DiGiPH Petition at 8-11. Northern Michigan states that cash flow projections are not sufficient to support principal repayment over only four years and believes that beginning principal payments in year six is feasible if repayment occurs over 15 years. Northern Michigan Petition at 5-6. In addition, Northern Michigan and McBride seek relaxation of the construction requirements for C block licensees but fail to present convincing rationales for their proposals. *See* Northern Michigan Petition at 9; McBride Petition at 5.

[55] *See* AT&T Opposition at 3 ("Bidders in any Commission auction understand that there is no guarantee of business success even if they win a license. The Commission should not now create an expectation that it will shield applicants or licensees from the results of bad business decisions, or take actions that suggest that some licensees are 'too big to fail.' The menu of options the Commission provided in the *Order* will provide most C-block licensees with sufficient financial relief to permit them to continue to participate in the wireless marketplace, although it may be on a reduced basis."); *see also* PrimeCo Opposition at 4 ("[A] fundamental restructuring of the installment payment terms previously established and agreed to would contravene the Commission's established auction objective of awarding licenses to parties who value them the most and are the most likely to rapidly deploy service." [citation omitted]).

individual licenses.[56] Retroactively changing the payment terms would be unfair to other applicants that might have bid differently under more relaxed payment terms.

30. Finally, we will not adopt the proposal made only by DiGiPH that the Commission somehow compensate those licensees that timely made the March 31, 1997, payment and, as a consequence, did not benefit from a suspension of that payment obligation.[57] Compensating licensees for complying with Commission rules would establish a precedent we consider inadvisable.[58] Furthermore, if a licensee opts to return all its licenses, we will refund any installment payments previously submitted for those licenses. If a licensee returns some licenses and retains others, the licensee will be allowed to apply previously submitted installment payments toward the prepayment of retained licenses or toward the Suspension Interest for retained licenses which the licensee does not prepay. For example, if a licensee elects resumption of payments for an MTA, any installment payments previously submitted for a BTA license within that MTA will be applied toward the Suspension Interest owed for that license, as described in the *Second Report and Order*.[59] The treatment of installment payments with respect to the

---

[56] *Second Report and Order*, 12 FCC Rcd at 16,438-39 para. 5.

[57] *See* DiGiPH Petition at 7-8.

[58] Moreover, the Commission has no explicit authority to pay interest to licensees, which was one of DiGiPH's suggestions. *Id.* at 8. For example, unsuccessful bidders in Commission auctions do not earn interest on their upfront payments or down payments. Rather, the accrued interest on these funds is transferred to the Telecommunications Development Fund. *See* Communications Act § 309(j)(8)(C), 47 U.S.C. § 309(j)(8)(C); 47 C.F.R. §§ 1.2106(a) and 1.2107(b).

[59] *Second Report and Order*, 12 FCC Rcd at 16,451 n.54 para. 27.

disaggregation and prepayment options is specified below. Therefore, because installment payments will either be refunded or credited, we believe additional compensation is unnecessary.

VI. SURRENDER OF LICENSES FOR REAUCTION (AMNESTY)

A. Background

31. In the *Second Report and Order*, the Commission adopted an amnesty option under which a C block licensee would be permitted to surrender all of its licenses in exchange for relief from its outstanding debt.[60] The Commission would waive any applicable default payments, subject to coordination with the Department of Justice pursuant to applicable federal claims collections standards.[61] Licensees electing this option would not have their down payments returned; however, neither would they be deemed in default or delinquent in meeting government debt obligations.[62] In addition, they would be eligible to bid for any and all licenses in the reauction[63] and would not be restricted in making post-auction acquisitions.[64]

32. Subject to one exception, licensees availing themselves of the amnesty option would be required to surrender all of

---

[60] *Second Report and Order*, 12 FCC Rcd at 16,462-64 paras. 53-58.

[61] *Id.*, 12 FCC Rcd at 16,462 para. 53. *See also* 4 C.F.R. Parts 101-105.

[62] *Second Report and Order*, 12 FCC Rcd at 16,462-63 para. 55.

[63] *Id.*, 12 FCC Rcd at 16,462 para. 54.

[64] *Id.*, 12 FCC Rcd at 16,439-40 para. 6.

their licenses to the Commission.[65] The sole exception to this "all-or-nothing" rule allowed licensees that met or exceeded the five-year build-out requirement on September 25, 1997, the date of adoption of the *Second Report and Order*, to keep licenses for built-out markets.[66] Specifically, a licensee utilizing this exception would be allowed to retain any built-out BTA, on the condition that it also keep any additional BTAs in the MTA where the built-out BTA is located and that it pay for all of those retained licenses under the terms of their original notes.[67]

33. The Commission noted in the *Second Report and Order* that, although the Bureau had suspended installment payments on C block licenses on March 31, 1997, some licensees had made installment payments after the suspension.[68] In addition, some licensees had made their regularly scheduled installment payments prior to the suspension.[69] The Commission directed the Bureau to refund any installment payments made (whether due on or before March 31, 1997) on any license surrendered under the amnesty option and announced that it would forgive payment of any due, but unpaid, installment payments for any surrendered license.[70] Licensees retaining licenses under the

---

[65] *Id.*, 12 FCC Rcd at 16,463 para. 56.

[66] *Id.*, 12 FCC Rcd at 16,463-64 para. 57.

[67] *Id.*

[68] *Id.*, 12 FCC Rcd at 16,464 para. 58. Some of these payments were installments due on March 31, 1997; others were amounts due on December 31, 1996, but not paid until March 31, 1997, based on the Commission's automatic 90-day non-delinquency rule. *Id.*

[69] *Id.*

[70] *Id.*

build-out exception were to pay over eight equal payments (beginning with the payment due on March 31, 1998) all Suspension Interest applicable to the retained licenses. All installment payments previously made by the licensee on any of its licenses would be applied to reduce the Suspension Interest applicable to the retained licenses, and any amounts remaining would be refunded.[71]

B. Discussion

34. In keeping with our decision on reconsideration to allow licensees to make elections on an MTA-by-MTA basis, we modify the amnesty option to permit licensees to select that option for as many of their MTAs as they choose. Because amnesty no longer requires an "all-or-nothing" choice, we also eliminate as moot the build-out exception.[72] Our decision is consistent with DiGiPH's recommendation that licensees be permitted "to return licenses for all BTAs on a per MTA basis, separate and apart from having met the

[71] *Id.*

[72] NextWave's request that the Commission "clarify" that the build-out exception encompasses all licensees that "invested significantly" in network build-out activities is now moot. *See* NextWave Petition at 17. *See also* Airtel Petition at 1; Christensen Petition at 1; CVI Wireless Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; URS Greiner Petition at 1; Dorne & Margolin *ex parte* filing at 1. Also moot is Omnipoint's suggestion that we allow licensees to disaggregate licenses retained under the build-out exception. *See* Omnipoint Petition at 5-6; Omnipoint Reply at 1-2. Permitting licensees to make elections on an MTA-by-MTA basis eliminates any need for Omnipoint's proposal because licensees are free to disaggregate licenses in any built-out MTAs they wish to retain.

five- year build out provisions . . . ."[73] The change also satisfies Alpine's request that licensees be entitled to turn in any or all of their licenses under amnesty.[74]

35. The Commission originally adopted the "all-or-nothing" requirement for the amnesty option in order to prevent licensees from "cherry-picking" only the most desirable MTAs.[75] The Commission believed that facilitating a "cherry-picking" scheme would limit the potential for licenses to be aggregated, which would decrease their value to bidders in the reauction.[76] On reconsideration, we find persuasive DiGiPH's contention that requiring licensees to keep or surrender entire MTAs, rather than BTAs, will sufficiently limit "cherry-picking."[77] We also agree with DiGiPH's position that applying the amnesty option on an MTA-by-MTA basis does not carry a risk of "cherry-picking" significantly different from that connected with the original disaggregation option.[78]

36. Several parties object to the fact that a licensee does not receive any refund of its down payment under the amnesty

[73] DiGiPH Petition at 4-7. DiGiPH offered this recommendation as an alternative to its suggestion that the Commission extend the date by which licensees would have to have met the five-year build-out requirement for the build-out exception. *Id. See also* NextWave Reply at 8.

[74] Alpine Petition at 9-10.

[75] *Second Report and Order*, 12 FCC Rcd at 16,463 para. 56.

[76] *See id.*, 12 FCC Rcd at 16,469 para. 67.

[77] DiGiPH Petition at 4-5.

[78] *Id. See also* NextWave Reply at 8 ("[T]he Commission should allow licensees to select options on an MTA basis. Establishing an MTA rule across the board eliminates any concern that permitting flexible selection of options would result in cherry picking.").

option.[79] As the Commission explained in the *Second Report and Order*, its intent in retaining the down payment was to ensure that licensees electing the amnesty option and participating in the reauction of their surrendered licenses do so without the undue advantage of having all of their original funds available to repurchase the same spectrum they surrendered.[80] The Commission further explained that licensees selecting amnesty would benefit substantially by avoiding being declared in default and thereby being freed from assessments of delinquencies and other collection costs associated with default payments.[81] The rationale of the *Second Report and Order* continues to be valid. If we were to allow C block licensees to return their licenses, receive a refund of their down payments, and participate in the reauction, we would undermine the integrity of the auction process by placing amnesty licensees in virtually the same position they would have occupied had the initial C block auction never taken place.

37. Nevertheless, we recognize that because all elections

---

[79] *See* Alpine Petition at 9-10; Hyundai Petition at 6 (contending that "forfeiture of up to 100 percent of a down payment does not appear rationally related to any harm"); Hyundai Reply at 4-7; McBride Petition at 2, 4 (claiming that the amnesty option is punitive in nature and requesting "100 percent return of all down payments, plus all the interest payments"). *See also* AmeriCall Opposition at 5-7 ("fairness and equity require at least that the forfeiture in an amnesty or disaggregation election be no greater than the forfeiture by a licensee electing prepayment . . . .").

[80] *Second Report and Order*, 12 FCC Rcd at 16,462-63 para. 55.

[81] *Id.*; *see also* 47 C.F.R. § 1.2110(f)(4)(iii), (iv). We note that both AmeriCall and Omnipoint ask that we establish specific timing goals for providing refunds to licensees electing the amnesty option. AmeriCall Petition at 3; Omnipoint Opposition at 14. The Bureau will address this issue in a forthcoming public notice on procedures.

now are being applied on an MTA-by-MTA basis, licensees are permitted to return licenses in certain MTAs and retain licenses in other MTAs, as with the prepayment option under the *Second Report and Order*. Thus, licensees electing the amnesty option have the following choice. For licenses in each MTA returned under the amnesty option, the licensee may choose either to: (1) receive no credit for its down payment(s) but remain eligible to bid in the reauction on all its licenses in the returned MTA (pure amnesty), or (2) obtain credit for 70 percent of its down payment and forgo for a period of two years from the start date of the reauction eligibility to reacquire the licenses it surrendered pursuant to this option through either reauction or any other secondary market transaction (amnesty/prepayment).[82] For purposes of this two-year eligibility restriction, a licensee includes qualifying members of the licensee's control group and their affiliates.[83] The 70 percent credit must be applied toward prepayment of the entire principal owed for a retained MTA with 30 MHz licenses and/or toward prepayment of the entire principal owed for the retained 15 MHz licenses of an MTA that has been disaggregated. Providing an additional choice within the amnesty option substantially increases the level of flexibility available to licensees and enables them to formulate new business plans that may be more attractive to lenders and investors. It also reflects a suggestion made by Alpine that licensees not participating in the C block reauction lose a substantially smaller portion of their down

---

[82] As mentioned above, if a licensee opts to return all its licenses, we will refund any installment payments previously submitted for those licenses.

[83] *See* Section X.B.2. below for the definition of "affiliate."

payment than that lost by licensees that do participate.[84]

VII. PREPAYMENT

A. Background

38. In the *Second Report and Order*, the Commission offered C block licensees the option to prepay the outstanding principal debt obligations for any licenses, on an MTA basis, that they elected to retain, subject to the restriction described below. The remaining licenses were required to be surrendered to the Commission for reauction.[85] In exchange, the Commission would forgive the debt on the surrendered licenses, and any associated payments owed.[86] A licensee electing this option would make its prepayment by using 70 percent of the total of all down payments made on the licenses it surrendered to the Commission, plus 100 percent of any installment payments previously paid for all licenses (collectively, "Available Down Payments"),[87] plus any "new

[84] *See* Alpine Petition at 9-10 ("[W]ith respect to the amnesty option, the Commission should revise the requirement for the forfeiture of down payments so that licensees have some incentive to accept this option. For those entities *not* participating in the re-auction, a substantially lesser penalty, keyed at most to the estimated cost incurred in re-auctioning the spectrum, would be a more appropriate means of insuring the integrity of the Commission's auction processes than total loss of the down payment. As to those entities who would desire to bid on such spectrum in the re-auction, a penalty of at most 30 percent of the previously made down payment would be appropriate.").

[85] *Second Report and Order*, 12 FCC Rcd at 16,467-70 paras. 64-69.

[86] *Id.*, 12 FCC Rcd at 16,467 para. 64.

[87] We clarify that the term "Available Down Payments," as used in paragraph 64 of the *Second Report and Order*, was intended to include both 70 percent of the down payment made on surrendered licenses and any

money" it was able to raise.[88] The remaining portion of the down payment applicable to the surrendered licenses would not be refunded or credited but simply would be retained by the Commission.[89] Licensees would be prohibited from bidding on their returned spectrum in the reauction or from reacquiring it in the secondary market for two years from the start of the reauction. Licensees could, however, bid on spectrum or licenses surrendered by other licensees, provided such licensees were not affiliates.

39. The requirement that a licensee had to prepay all its BTA licenses within those MTAs that it selected for prepayment prevented "cherry-picking" because licensees could not prepay only the most desirable BTA licenses within a given MTA and then surrender the rest.[90] The one exception to this rule was that any licensee lacking sufficient funds to prepay every BTA license within a chosen MTA would be permitted to prepay only those BTA licenses within that MTA that it could afford.[91] The licenses for the remaining BTAs within that MTA which the licensee could not afford to prepay would be surrendered to the Commission.

installment payments previously submitted for those licenses. *Id.*

[88] *Id.* Since the *Second Report and Order* established that interest already paid is to be wholly credited toward prepayment under this option, Urban Communicators' request to that effect is moot. Urban Communicators Petition at 10.

[89] *Second Report and Order*, 12 FCC Rcd at 16,467 para. 64.

[90] *Id.*, 12 FCC Rcd at 16,469 para. 67.

[91] *Id.*

B. Discussion

40. By providing a license free and clear of debt and payment conditions, prepayment makes it easier for licensees to raise the additional capital necessary to build out their systems and deploy new services. Thus, consumers benefit by receiving service sooner. Prepayment also removes the Commission from the role of lender, which sometimes may conflict with its responsibilities as a regulator.[92] In addition, prepayment benefits the public because it assures taxpayers of full payment of licenses. Indeed, we have implicitly expressed our preference for prepayment by eliminating installment payments as a means of financing small business participation for the immediate future.[93]

41. Under our modified approach, the prepayment option remains essentially the same as set forth in the *Second Report and Order*. For any 30 MHz licenses that are returned to the Commission, the licensee may continue to apply 70 percent of the down payment made on those licenses toward the prepayment of the entire outstanding principal owed in retained MTAs. The licensee may pool any down payment amounts that have been designated for prepayment, plus installment payments previously paid on any returned licenses.[94] We will refer to this pool of credit as a licensee's

---

[92] *See* FCC Report to Congress on Spectrum Auctions, WT Docket No. 97- 150, *Report*, FCC 97-353 (released October 9, 1997) at 39-40.

[93] *Part I Third Report and Order* at paras. 38-40.

[94] As described below, down payment amounts may also come from disaggregated licenses if the licensee uses the credit for prepayment. The treatment of installment payments previously submitted for disaggregated licenses is also described below.

"Prepayment Credit."[95] This Prepayment Credit may be used to prepay any retained MTAs with 30 MHz licenses. As will be discussed in more detail below, it also may be used to prepay the retained 15 MHz licenses of any MTAs that have been disaggregated.

42. As under the *Second Report and Order*, any "new money" that is used to make prepayment must be submitted on or before the election date. Unlike under the *Second Report and Order*,[96] affiliated licensees will be allowed to combine their Prepayment Credits.[97] However, any affiliated licensees that choose to pool their Prepayment Credits will be considered one licensee for purposes of making elections. Therefore, the elections made by those affiliates must be made in concert and must be made on an MTA-by-MTA basis, as is required of individual licensees.[98] Credit pooling does not require the participation of all of a licensee's affiliates. Any affiliate that chooses not to pool its credit along with its other affiliates will be considered an individual licensee for purposes of making elections. We believe on

---

[95] The term "Prepayment Credit" is essentially a substitution for the term "Available Down Payments," updated to account for the additional flexibility provided under our modified approach.

[96] *Second Report and Order*, 12 FCC Rcd 16,467 n.144 para. 64.

[97] *See* Section X.B.2. below for the definition of "affiliate."

[98] Therefore, if affiliated licensees decide to pool their credits, then all BTA licenses held by any of those affiliates must be surrendered for credit in any MTA where one of their BTA licenses is surrendered for credit. Similarly, those affiliated licensees must collectively select MTAs for prepayment, and all BTA licenses held by any of those affiliates in those selected MTAs must be prepaid, subject to the affordability exception. Likewise, if those affiliated licensees choose to disaggregate an MTA, then all BTA licenses held by any of those affiliates in that MTA must be disaggregated, and so on.

reconsideration that allowing this flexibility is consistent with the fact that, for purposes of the reauction, we consider a licensee and its affiliates to be the same entity. It also will prevent licensees from being disadvantaged if, without such a rule, they would have been precluded from electing prepayment by virtue of the fact that they transferred BTA licenses to affiliates.

43. In response to a request from DiGiPH, we make one important clarification. DiGiPH argues that, because affordability is a concept subject to differing interpretations, the Commission should further define its requirement that a licensee must prepay all of those BTA licenses within the MTA "that it can afford."[99] We clarify that, for purposes of this exception, a licensee can "afford" to prepay all of its BTA licenses within that MTA if it can prepay all BTA licenses using only its Prepayment Credit. If this amount is not enough to prepay all its BTA licenses within an MTA, the licensee must prepay as many BTA licenses in the MTA as this amount will allow and must surrender for reauction the remaining BTA licenses that it cannot afford to prepay.[100] Only under these circumstances may a licensee choose, within the given MTA, which BTA licenses to prepay and which to surrender. Once a licensee adds any "new money" at all to make prepayment, the affordability exception does not apply, and the licensee must add sufficient "new money" that, when added to its Prepayment Credit, is adequate to prepay all its BTA licenses within its chosen MTAs. A

[99] DiGiPH Petition at 11-12.

[100] *But see* ClearComm *ex parte* filing at 1 (urging the Commission to allow licensees to prepay one or more BTA licenses in an MTA while retaining, and resuming payments on, the remaining BTA licenses in the MTA).

licensee claiming the affordability exception may choose only one MTA in which it will apply, and it must prepay all its BTA licenses within all other MTAs selected for prepayment. The Commission will not refund any unspent portion of the Prepayment Credit.[101] We believe retaining any unspent portion of the Prepayment Credit is a reasonable price for relieving the requirement that all BTA licenses in all MTAs be prepaid. The affordability exception also will apply to disaggregated MTAs that the licensee wishes to prepay.

44. This clarification provides an objective means for licensees to implement the affordability exception. It

[101] For example, assume a licensee owns 30 licenses held in 3 MTAs as follows: 2 licenses in MTA #1, 12 licenses in MTA #2, and 16 licenses in MTA #3; that each license cost $100,000; that the licensee made a down payment of $10,000 on each license leaving $90,000 as the debt on each license; and that the licensee made no installment payments. If the licensee chooses to prepay the licenses in MTA #1, its Prepayment Credit will be $196,000 (28 x $10,000 down payment for each license not being prepaid x 70 percent). Utilizing its Prepayment Credit of $196,000, the licensee can "afford" to prepay all of its licenses in MTA #1. The unspent portion of its Prepayment Credit [$196,000 less (2 x $90,000) = $16,000] will be retained by the Commission.

If instead the licensee decided to prepay licenses in MTA #3, it can only "afford" to prepay 2 of those 16 licenses calculated as follows: 2 x $90,000 = $180,000 needed to prepay; Prepayment Credit is calculated as follows: 28 x $10,000 x 70 percent = $196,000. The licensee may elect which 2 licenses to prepay and must surrender the remaining 14 licenses. The Commission will retain the unspent portion of the Prepayment Credit, which is $16,000 [$196,000 less (2 x $90,000) = $16,000]. If, however, the licensee elects to add "new money" to its Prepayment Credit, it *must* add enough "new money" to the Prepayment Credit to prepay the remaining 14 licenses in MTA #3 (i.e., 14 x $90,000 less $16,000 = $1,244,000 of "new money" needed). The licensee may not add only $74,000 of "new money" and prepay a third license while surrendering the remaining 13 unprepaid licenses.

eliminates any doubt or confusion regarding the scope of the term "afford," and it is an easy, bright-line test to administer. In addition, we believe the restrictions we impose on the affordability exception minimize a licensee's ability to "cherry-pick" among BTAs. Therefore, we reject Omnipoint's request that the Commission eliminate the affordability exception, or in the alternative, grant all licensees unlimited flexibility under all options to select which BTA licenses to retain and which to surrender.[102]

45. We reject arguments claiming that the prepayment option should be revised or eliminated because it benefits only certain licensees.[103] Each of the payment relief options presented to C block licensees is designed to strike a fair balance of competing interests, with benefits and obligations appropriate to varying circumstances. Although these options are intended to provide distinct choices for licensees, they adhere to a consistent set of principles. Moreover, the available choices complement each other to provide a range of alternatives to the various C block licensees experiencing financial difficulties. Because it is an important component in this package of options and because we continue to believe it is sound as a matter of policy, we decline to eliminate the prepayment option. A menu of options is provided because no single solution would be appropriate for every situation; therefore, eliminating any one option would prejudice those

---

[102] Omnipoint Opposition at 9; Omnipoint Reply at 2.

[103] *See* McBride Petition at 2-3 (the prepayment option favors large bidders that have multiple licenses from which to choose, whereas small bidders seeking to keep licenses with payment relief are forced to disaggregate); Central Oregon Petition at 6 (single licensees get no benefit from the buy-out option); Omnipoint Reply at 2 (the prepayment option should be eliminated because "it amounts to nothing other than an opportunity for a handful of the largest bidders to 'cherry-pick' licenses").

licensees for which it may be best suited.

46. We note that we received numerous requests to allow licensees to use their entire down payment under the prepayment option.[104] We will maintain our rule that licensees electing the prepayment option will receive no refund or credit for 30 percent of the down payment made on 30 MHz licenses they surrender to the Commission. We believe that retention of this portion of the down payment is necessary to preserve the integrity of the auction process.[105] Furthermore, to return the entire down payment would undermine the purpose of the down payment -- to help ensure performance on a licensee's debt obligation.[106] We disagree with parties that characterize retention of a portion of the

---

[104] *See* Airtel Petition at 1; Alpine Petition at 10; Cellexis Petition at 6; Cellnet Petition at 2; Christensen Petition at 1; CVI Wireless Petition at 1; Federal Network Petition at 1; Fox Communications Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; Meretel Petition at 3; MFRI Petition at 4; New Wave Petition at 1; NextWave Petition at 10-15; OnQue Petition at 2; One Stop Wireless Petition at 2; Prime Matrix Petition at 1; RFW Petition at 5; UCNI Petition at 2; Urban Communicators Petition at 10; URS Greiner Petition at 1; Wireless Nation Petition at 2; Duluth PCS, et al. Opposition at 5-8; Polycell Opposition at 5-8; Third Kentucky Opposition at 2; CX Systems *ex parte* filing at 1; Cyber Sites *ex parte* filing at 1; Dorne & Margolin *ex parte* filing at 1. See also Hyundai Petition at 4-7; Christensen *ex parte* filing at 1; Florida Power *ex parte* filing at 1; Kabbara *ex parte* filing at 1; LaBarge Clayco *ex parte* filing at 1; Leifer, Marter *ex parte* filing at 1; MJA *ex parte* filing at 1; OPM *ex parte* filing at 1; Specialty Teleconstructors *ex parte* filing at 1; Structure Consulting *ex parte* filing at 1; Xway *ex parte* filing at 1; MRFI Reply at 1; Wireless Ventures Reply at 3.

[105] *See* Communications Act § 309(j), 47 U.S.C. § 309(j).

[106] *See* Communications Act § 309(j)(4)(B), 47 U.S.C. § 309(j)(4)(B); In the Matter of BDPCS, Inc., *Order*, 12 FCC Rcd 6606 (WTB 1997), *application for review pending*.

down payment as punitive,[107] a penalty,[108] or a forfeiture.[109] We view 30 percent of the down payment as the fair and reasonable price for receiving the benefits of this option.[110] We also note that AirGate correctly characterizes the prepayment option as a method of providing licensees with more flexibility in using their down payments than is permitted under current rules.[111]

47. We disagree with NextWave, Cellexis, and other parties that the Commission should account for the net present value of forgoing installment payments,[112] or otherwise discount the

---

[107] *See, e.g.*, Alpine Petition at 8; RFW Petition at 5; MFRI Petition at 4.

[108] *See, e.g.*, NextWave Petition at 10-15; Duluth PCS, et al. Opposition at 5-6; Polycell Opposition at 5-6.

[109] *See, e.g.*, AmeriCall Opposition at 5-7; Hyundai Reply at 4-6.

[110] Several parties asking the Commission to reject petitioners' request to use the entire down payment under the prepayment option reiterate the Commission's discussion on this matter in the *Second Report and Order*. *See* Sprint Opposition at 4-5 (arguing that giving full credit would be unfair to unsuccessful bidders and to licensees that resume payments under their existing obligations); Antigone/Devco Opposition at 3-5 (asking the Commission to retain 30 percent of the down payment to preserve the integrity of the auction process). Although Omnipoint recognizes that retaining the 30 percent down payment on surrendered licenses is not punitive, we disagree with its reasoning that it accounts for reauction costs to the government. *See* Omnipoint Opposition at 3-5.

[111] AirGate Opposition at 13. AirGate notes that it would support "a limited exception" to permit licensees that elect to prepay all of their C block licenses to use all of their down payment toward the cash purchase price. *Id.* at 13 n.22. No such exception is necessary, given that AirGate's scenario is no different from paying off the entire installment debt early.

[112] *See* NextWave Reply at 8-9 (net present value accurately presents the size of PCS debt in light of the licensee's higher cost of capital compared to the government rate of interest); Cellexis Reply at 6 (by

principal amount due under the installment payment plan.[113] As Sprint points out, the Commission has considered this argument extensively and properly rejected it.[114] In the *Second Report and Order*, the Commission stated that a licensee should be required to pay the face value of its auction bid.[115] Accounting for the net present value of

---

charging nominal value rather than net present value, the Commission is raising the effective price of the license). *See also* Airtel Petition at 1; Alpine Petition at 10; Cellexis Petition at 6-7; Cellnet Petition at 2; Central Oregon Petition at 4- 6; Christensen Petition at 1; CVI Wireless Petition at 1; Federal Network Petition at 1; Fox Communications Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; MFRI Petition at 4-5; New Wave Petition at 1; NextWave Petition at 5-10; Northern Michigan Petition at 7; OnQue Petition at 2; One Stop Wireless Petition at 2; Prime Matrix Petition at 1; RFW Petition at 6; URS Greiner Petition at 1; UCNI Petition at 2; Urban Communicators Petition at 10; Wireless Nation Petition at 2; Meretel Petition at 2; Polycell Opposition at 9; Duluth PCS, et al. Opposition at 9; Third Kentucky Opposition at 2; Christensen *ex parte* filing at 1; CX Systems *ex parte* filing at 1; Cyber Sites *ex parte* filing at 1; Dorne & Margolin *ex parte* filing at 1; Florida Power *ex parte* filing at 1; LaBarge Clayco *ex parte* filing at 1; Leifer, Marter *ex parte* filing at 1; MJA *ex parte* filing at 1; OPM *ex parte* filing at 1; Specialty Teleconstructors *ex parte* filing at 1; Structure Consulting *ex parte* filing at 1; Xway *ex parte* filing at 1; Wireless Ventures Reply at 3.

[113] *Compare* Alpine Petition at 10 (a 59 percent discount from the face amount of the note would account for the present value of the Commission's financing) *with* NextWave Petition at 5-10 (arguing for a discount rate of at least 15 percent) and Third Kentucky Opposition at 2 (same as NextWave). *See also* Meretel Petition at 2 (prepayment is not a viable option unless the prepaid amount is equal to or below that of the price paid for A and B block licenses).

[114] Sprint Opposition at 4.

[115] *Second Report and Order*, 12 FCC Rcd at 16,468 para. 66. *See also id.*, Separate Statement of Susan Ness, 12 FCC Rcd at 16,511 ("In my view, the price bid is the price bid. Bidders were not offered a cash versus credit price.").

forgoing installment payments would rewrite the auction results because it would have the effect of changing the amounts bid for licenses.[116] Therefore, to do so would be unfair to those bidders that withdrew from the auction under the assumption that the winning bid amounts represented the prices that would be paid for the licenses.[117] Because we continue to support the policy that auction bids should be paid at their face value, we will not discount the principal due.[118] Although the Commission provides favorable terms for financing the bid price, the cost of an installment payment plan is the interest that accrues over time. The benefit to a licensee for early pay-off of its financial obligations is the savings in the amount of interest that otherwise would be owed.[119] We believe this trade-off provides a further reason for not discounting the principal.

48. We decline to provide further flexibility under the

---

[116] *See* AirGate Opposition at 7-9 (a reduction in bid amounts would translate into a rewrite of the auction results).

[117] *See* Omnipoint Opposition at 6-7 (a net present value discount would be fundamentally unfair to other bidders in the auction that properly relied on the Commission's rule that high bidders must pay the entire nominal amount of their bids or their licenses automatically cancel).

[118] Moreover, if we were to discount the debt at a licensee's cost of capital it would be impossible to determine accurately a cost of capital for all licensees. The cost of capital varies for each licensee because it is based on a licensee's individual cost of debt and equity and on the ratio of debt to equity. Therefore, no single discount rate would be appropriate for every licensee. *See* Omnipoint Opposition at 6-8 (a net present value discount "would be impossible to implement in a manner that is fair and avoids unjust enrichment, because all parties -- including each Block C licensee and the U.S. Government -- have separate costs of capital").

[119] *See* ALLTEL Opposition at 2-4; Northcoast Opposition at 5; Antigone/Devco Opposition at 2; Fidelity Capital Opposition at 3-4.

prepayment option. Cellexis requests that the Commission grant the five-year build-out exception provided under the amnesty option to licensees choosing the prepayment option.[120] A build-out exception is not needed because, under our modified approach, licensees are permitted to retain any MTAs they wish, whether built- out or not. Regardless, even under the approach adopted in the *Second Report and Order*, a build-out exception was unnecessary because licensees had the discretion to choose which MTAs to prepay and which to surrender, as opposed to the "all-or-nothing" approach under the original amnesty option.[121] In addition, we decline MFRI's request to allow a licensee that holds both C and F block licenses to use its C block down payment to purchase for cash its F block licenses.[122] We do not believe such flexibility is warranted because the reduction of debt associated with prepayment will help those licensees address their capital needs in servicing their F block debt. Finally, Urban Communicators argues that the requirement that prepaying licensees must purchase all BTA licenses held within an MTA is unfair to licensees that have licenses in only one MTA.[123] We disagree. This restriction is essential to prevent "cherry-picking," and a licensee that cannot avail itself of this option can either choose another option or limit its purchases under the affordability exception, if applicable.

---

[120] Cellexis Petition at 6.

[121] *See Second Report and Order*, 12 FCC Rcd at 16,469 para. 68.

[122] MFRI Petition at 5.

[123] Urban Communicators Petition at 10. *But see* AirGate Opposition at 14- 15 (licensees should not be permitted to return licenses on a BTA-by-BTA basis).

VIII. DISAGGREGATION OF SPECTRUM FOR REAUCTION

A. Background

49. In the *Second Report and Order*, the Commission offered C block licensees the option to disaggregate a portion of their spectrum and return it to the Commission for reauction.[124] Licensees electing the disaggregation option would return one-half (i.e., 15 MHz of 30 MHz) of their spectrum from each of their BTA licenses within the MTAs in which they chose to disaggregate spectrum.[125] In other words, licensees would not be required to disaggregate spectrum for all of the licenses they hold, but they would have to disaggregate spectrum for all of the licenses they hold in a given MTA if they disaggregated spectrum for one license in that MTA. The returned spectrum would have to be at 1895 - 1902.5 MHz paired with 1975 - 1982.5 MHz, which is spectrum contiguous to the F block.[126]

50. In exchange, the Commission would reduce by 50 percent the amount of debt that was owed on a 30 MHz license before it was disaggregated.[127] Fifty percent of the down payment made on the 30 MHz license would be considered the down payment for the retained 15 MHz of spectrum, but the Commission would not provide a refund or credit for the remaining 50 percent of the down payment.[128]

---

[124] *Second Report and Order*, 12 FCC Rcd at 16,455 para. 38.

[125] *Id.*

[126] *Id.*, 12 FCC Rcd at 16,456 para. 39.

[127] *Id.*, 12 FCC Rcd at 16,456 para. 40.

[128] *Id.*

Licensees were required to repay over eight equal payments (beginning with the payment due on March 31, 1998) all Suspension Interest, adjusted to reflect the reduction in debt obligation.[129] Any installment payments that were paid prior to the suspension would be credited in full against those amounts.[130] Licensees were prohibited from bidding on their returned spectrum in the reauction or from reacquiring it in the secondary market for two years from the start of the reauction.[131] Licensees could, however, bid on spectrum or licenses surrendered by other licensees, provided such licensees were not affiliates.[132]

B. Discussion

51. As provided under the *Second Report and Order*, when a licensee disaggregates an MTA, it will receive full credit for the portion of the down payment applicable to the spectrum retained from a license (i.e., 50 percent of the down payment made on the original 30 MHz license). However, on reconsideration, we modify our decision that licensees electing the disaggregation option receive no refund or credit for the portion of the down payment applicable to the returned spectrum. For each disaggregated license for which the licensee elects to resume installment payments, rather than prepay, we will provide a credit of 40 percent of the down payment applicable to the 15 MHz of spectrum that is returned to the Commission. The 40 percent credit may only be used to reduce the amount owed on the 15 MHz of

---

[129] *Id.*

[130] *Id.*

[131] *Id.*, 12 FCC Rcd at 16,457 para. 42.

[132] *Id.*

spectrum retained from the same BTA license that generated the credit. The credit, at the licensee's option, may be applied either to Suspension Interest and/or to reduce the principal outstanding.[133] Any installment payments previously submitted for a disaggregated license for which the licensee elects to resume installment payments will be credited as described in the *Second Report and Order* (i.e., toward Suspension Interest).[134]

52. We derived the 40 percent credit because when it is combined with the 100 percent credit associated with the retained spectrum, the licensee will receive a credit of 70 percent of the total down payment for the original 30 MHz license. We have decided to allow this additional credit because we are persuaded by the argument of several parties that the credit permitted under the disaggregation option should be consistent with the 70 percent credit permitted under the prepayment option.[135] We believe the disparity that

---

[133] *See* The Honorable Albert R. Wynn *ex parte* filing at 1-2 (licensees electing disaggregation should be allowed "to apply their excess down payments and interest payments they have made to their upcoming installment payments, thereby providing them, in exchange for actual money already paid to the U.S. Government, a brief extension of time to complete their financing").

[134] *Second Report and Order*, 12 FCC Rcd at 16,456 para. 40.

[135] Omnipoint Petition at 8-9; McBride Petition at 1-2; AmeriCall Opposition at 6. *See also* ClearComm Petition at 18-21 (if the Commission refuses to allow licensees full use of their down payments, then licensees electing disaggregation should at least not be subject to a greater penalty than those electing prepayment). *But see* AirGate Opposition at 12 (the Commission's decision to retain 50 percent of the down payment is reasonable).

As discussed above, a licensee that selects the amnesty option and chooses to bid on its returned licenses in the reauction will not receive credit for any

existed under the *Second Report and Order* was unfair to licensees that were precluded from electing prepayment. Furthermore, allowing this additional credit will advance the purposes of the disaggregation option. Disaggregation benefits both licensees and consumers because it provides a means for licensees to remain in a market area at a significantly reduced cost. By having their outstanding debt decreased by 50 percent, licensees improve their ability to finance their retained spectrum and build out their networks. In addition, disaggregation is pro-competitive because it provides a means for other competitors to enter a market area. It also gives unsuccessful bidders an opportunity to rebid on spectrum in market areas in which they were initially outbid. We believe the additional 40 percent credit will promote these benefits of disaggregation and will help licensees that have expressed an interest in disaggregation to take advantage of this option and continue their plans to provide service in their license areas.

53. We believe a 40 percent credit is warranted when a licensee resumes installment payments on a disaggregated MTA because the licensee remains in the MTA and continues building out its network in order to serve those consumers. We will not provide such a 40 percent credit to licensees that resume installment payments on a license in a different MTA. In contrast to a licensee that uses the 40 percent credit to resume installments on the retained portion of the disaggregated license, a licensee that seeks to apply a 40 percent credit from down payments made on licenses returned under an amnesty election would have, under those

---

of its down payment made on its returned licenses. We believe a licensee's opportunity to bid on its returned licenses is equitable compensation for not receiving any down payment credit.

circumstances, abandoned service to the entire licensed area affected by that election. We believe that licensees that surrender licenses should not receive a credit for abandoning those markets unless they use the credit to prepay retained licenses.

54. We also revise the approach adopted in the *Second Report and Order* to provide for a combination of disaggregation and prepayment. As we have discussed, there are many advantages to both prepayment and disaggregation, and we believe a combination of the two should be encouraged because it offers the benefits of both options. For example, the licensee continues to build out its network in the market area, the Commission is relieved from its position of lender, and competing entities have the opportunity to bid on the returned spectrum. Therefore, if a licensee disaggregates an MTA and prepays the outstanding principal owed on the retained portion of the MTA, we will provide the licensee with a higher percentage of credit as an incentive to choose both disaggregation and prepayment. Instead of a 40 percent credit, a licensee that elects both disaggregation and prepayment will receive credit for 70 percent of the down payment applicable to the returned spectrum.[136] This 70 percent credit will be added to the licensee's Prepayment Credit which, as explained above, may be used to prepay any retained MTAs with 30 MHz licenses and/or the retained portions of any MTAs that have been disaggregated. Allowing this 70 percent credit is consistent with our policy of providing a 70 percent credit for 30 MHz licenses that are returned to the Commission. In both cases, the credit is 70

[136] The portion of the down payment applicable to the returned spectrum is the equivalent of 50 percent of the down payment made on the original 30 MHz license.

percent of the down payment associated with the amount of spectrum that is returned. In addition, any installment payments previously submitted for the licenses in an MTA that is both disaggregated and prepaid will be added to the licensee's Prepayment Credit.

55. If a licensee elects both disaggregation and prepayment for an MTA, the licensee must prepay the principal owed on the 15 MHz of spectrum retained from each BTA license in the MTA. However, if a licensee's Prepayment Credit is insufficient to make full prepayment on the entire MTA, then the affordability exception will apply. Thus, the licensee will be required to prepay only what it can afford and it must return the rest of the spectrum to the Commission for reauction. As with prepayment of full 30 MHz licenses, the exception will not apply if any "new money" is added to make prepayment, and the exception may be applied to only one MTA.

56. We received numerous requests to allow licensees to receive credit for their entire down payment under the disaggregation option.[137] We consider it inadvisable to

[137] *See* Airtel Petition at 1; Alpine Petition at 9; Cellexis Petition at 6; Cellnet Petition at 2; Christensen Petition at 1; ClearComm Petition at 6-18; CVI Wireless Petition at 1; Federal Network Petition at 1; Fox Communications Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; Meretel Petition at 3; MFRI Petition at 4; NextWave Petition at 10-15; New Wave Petition at 1; One Stop Wireless Petition at 2; Prime Matrix Petition at 1; RFW Petition at 5; UCNI Petition at 2; URS Greiner Petition at 1; Wireless Nation Petition at 2; ClearComm Opposition at 2-4; Duluth PCS, et al. Opposition at 5- 8; Polycell Opposition at 5-8; Third Kentucky Opposition at 2; ClearComm Reply at 3-6; Hyundai Reply at 4-7; Wireless Ventures Reply at 3; CX Systems *ex parte* filing at 1; Dorne & Margolin *ex parte* filing at 1. *See also* Hyundai Petition at 4-7; Christensen *ex parte* filing at 1; Cyber Sites *ex parte* filing at 1; Florida Power *ex parte* filing at

provide full credit because we believe that to do so would undermine the integrity of the auction process.[138] As the Commission concluded in the *Second Report and Order*, allowing licensees to use their entire down payment would be unfair to those C block licensees electing to continue under the existing installment payment plan and to bidders that were unsuccessful in the auction.[139] We note that we already provide a substantial credit, and we believe that providing any further credit would not be sound public policy. As Fidelity Capital observes, if a licensee "believes the Commission is not providing an attractive disaggregation policy, then it is free to disaggregate its spectrum privately to another qualifying entity."[140]

57. Because numerous benefits are conferred under the disaggregation option, we disagree with NextWave, ClearComm, and other parties that not providing a refund or credit for all of the down payment constitutes a penalty or forfeiture.[141] Under disaggregation, the Commission forgives

---

1; Kabbara *ex parte* filing at 1; LaBarge Clayco *ex parte* filing at 1; Leifer, Marter *ex parte* filing at 1; MJA *ex parte* filing at 1; OPM *ex parte* filing at 1; Specialty Teleconstructors *ex parte* filing at 1; Structure Consulting *ex parte* filing at 1; Xway *ex parte* filing at 1.

[138] *See* Communications Act § 309(j), 47 U.S.C. § 309(j).

[139] *Second Report and Order*, 12 FCC Rcd at 16,468 para. 65; *see also* Sprint Opposition at 4-5.

[140] Fidelity Capital Opposition at 4-5 (the present terms of the disaggregation option are fair). *But see* ClearComm Reply at 7 (Fidelity Capital's argument favoring private disaggregation overlooks the fact that the Commission can more efficiently redistribute the disaggregated spectrum).

[141] NextWave Petition at 10-15 (no rational basis exists for the penalty because no rule has been violated and no default or bid withdrawal has occurred); ClearComm Petition at 6-18 (there is no equitable or legal

up to half of a licensee's outstanding debt, an action that will facilitate investment and growth by making more funds available to licensees for build-out. In addition, the Commission provides low-cost, long-term financing for the retained spectrum. Furthermore, the Commission renders a valuable service by providing an efficient and cost-effective mechanism for transferring spectrum that licensees otherwise might have been forced to resell in the secondary market at great risk. In exchange, the Commission receives the disaggregated spectrum and retains a portion of the down payment applicable to that spectrum. Therefore, retention of part of the down payment is not a penalty; rather, it is the fair and reasonable price for receiving the benefits of disaggregation.

58. We are not persuaded that we should add even greater flexibility to the disaggregation option. We decline to adopt MFRI's suggestion that we allow C block licensees to retain the 15 MHz of spectrum adjacent to the F block if they also hold the F block license for the same BTA.[142] Allowing certain C block licensees to disaggregate a different portion of spectrum would create a patchwork pattern of spectrum blocks in the reauction and would limit the opportunity for F block licensees to aggregate larger spectrum blocks by bidding on contiguous spectrum in the reauction. To promote consistency and simplicity in the reauction, we also reject

---

justification for the penalty because disaggregating licensees willingly surrender a *pro rata* portion of spectrum); ClearComm Reply at 2-6 (by imposing a penalty on disaggregating licensees, the Commission's action is inconsistent with that of a reasonable commercial lender). *See, e.g.*, Cellexis Petition at 6; Hyundai Petition at 4-7; Meretel Petition at 3; MFRI Petition at 4; New Wave Petition at 2; ClearComm Opposition at 2-4; Duluth PCS, et al. Opposition at 5- 8; Polycell Opposition at 5-8; Hyundai Reply at 4-7.

[142] MFRI Petition at 6.

McBride's request that we allow licensees the choice to disaggregate 10, 15, or 20 MHz of spectrum.[143] Allowing licensees to disaggregate different pieces of spectrum would create inefficiency in the market and would limit the potential for aggregation, thereby decreasing the value of spectrum in the reauction and delaying service to the public. Finally, we disagree with Alpine and Urban Communicators that disaggregation should be permitted on a BTA-by-BTA basis, rather than on an MTA-by-MTA basis.[144] As AirGate notes, disaggregation on an MTA-by-MTA basis will promote participation in the reauction because licensees are prohibited from selectively retaining 30 MHz of spectrum in only the most desirable BTAs.[145]

59. NextWave and Cellexis argue that the build-out

---

[143] McBride Petition at 5. In addition, McBride claims that, by allowing the entry of more competitors through disaggregation, the Commission has frustrated expectations that a maximum of six PCS licenses would exist in each market (one each for blocks A through F). *Id.* at 2. McBride's argument is misplaced because Section 24.714 of the Commission's rules permit broadband PCS licensees in blocks A through F to disaggregate any amount of spectrum through the marketplace to qualified entities. 47 C.F.R. § 24.714. Moreover, it has always been the Commission's goal to encourage the widest participation in the wireless market, in accordance with Congress' mandate. *See* Communications Act § 309(j)(3)(B), 47 U.S.C. § 309(j)(3)(B).

[144] Alpine Petition at 9; Urban Communicators Petition at 9. Alpine offers no rationale for a BTA-by-BTA requirement, and Urban Communicators makes an unpersuasive claim that an MTA-by-MTA requirement provides little relief for licensees that hold licenses in only one MTA. A licensee disaggregating spectrum in its only MTA would receive all the benefits of disaggregation, including the forgiveness of half its outstanding debt.

[145] AirGate Opposition at 14-15; *see also Second Report and Order*, 12 FCC Rcd at 16,455 para. 38.

exception permitted under the amnesty option should be extended to licensees selecting the disaggregation option.[146] Under our modified approach, a build-out exception is unnecessary because licensees have the flexibility to determine which MTAs to retain and which to surrender. Nonetheless, as stated in the *Second Report and Order*, a build-out exception was never needed under the disaggregation option because, unlike the original amnesty option, the disaggregation option was never an "all-or-nothing" proposition.[147] Under the original amnesty option, a licensee was required to surrender all licenses except for those in MTAs in which it satisfied the build-out requirement. By comparison, disaggregation was permitted on an MTA-by-MTA basis, and so licensees were never compelled to disaggregate spectrum in all their MTAs.

60. Finally, we affirm the statement in the *Second Report and Order* that upon acceptance of the election notice, the disaggregated spectrum will be deemed returned to the Commission.[148] Further, after disaggregation, notwithstanding the fact that a disaggregating licensee will continue to hold in its possession a 30 MHz license, that license will no longer authorize use of the 15 MHz of spectrum that is surrendered to the Commission but will continue to be valid with respect to the 15 MHz of spectrum

---

[146] NextWave Petition at 15-16; Cellexis Petition at 6. In addition, a number of parties argue generally that licensees should be allowed to retain licenses in which they have made significant build-out. See Airtel Petition at 1; Christensen Petition at 1; CVI Wireless Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; URS Greiner Petition at 1; Dorne & Margolin *ex parte* filing at 1.

[147] *Second Report and Order*, 12 FCC Rcd at 16,455 para. 38.

[148] *Id.*, 12 FCC Rcd at 16,470 para. 73.

that is retained.

IX. ELECTION PROCEDURES

A. Background

61. In the *Second Report and Order*, the Commission established January 15, 1998, as the deadline for C block licensees to elect to continue under the existing installment payment plan or to elect one of the three alternative options.[149] The Commission also required, inter alia, C block licensees whose elections would necessitate ongoing payments to execute any necessary financing documents pursuant to appropriate requirements and time frames established by the Bureau. The Commission specified procedures to be followed by licensees electing to continue under their existing notes or electing disaggregation, amnesty, or prepayment.

62. On January 7, 1998, we changed the election date to February 26, 1998, in order to allow licensees to submit their elections after final disposition of arguments raised on reconsideration.[150] On February 24, 1998, we issued an order changing the election date to 60 days after publication of this Order on Reconsideration in the *Federal Register*.[151]

---

[149] *Id.*, 12 FCC Rcd at 16,470 para. 70.

[150] *Election Date Order I* at para. 2.

[151] *Election Date Order II*.

B. Discussion

63. Moving the election date was an appropriate action given the large number of petitions for reconsideration filed in this proceeding. The revised deadline has provided sufficient time for us to respond to arguments raised on reconsideration so that licensees can be assured of regulatory certainty before making their elections. The postponement satisfies the requests of several parties that the date be delayed.[152] We deny, however, other requests for a still longer postponement.[153] Licensees already have had several months in which to consider the options under the *Second*

---

[152] *See, e.g.*, Horizon Petition at 2 (requesting that the election deadline be moved to March 15, 1998); MFRI Opposition at 2; Third Kentucky Opposition at 2; RFW *ex parte* filing at 1-2. *But see* AirGate Opposition at 15-16 (the January 15, 1998, election date should be maintained).

[153] *See* NextWave Petition at 19-22 (before requiring licensees to make an election, the Commission should resolve control group issues, clarify the role of the Department of Justice, and adopt final World Trade Organization implementation rules); Polycell Opposition at 4-5 (same as NextWave); Duluth PCS, et al. Opposition at 4-5 (same as NextWave); Omnipoint Petition at 13-14 (before licensees relinquish valuable spectrum assets, the Commission should clarify its position on bankruptcy and its jurisdiction to engage in debt forgiveness); Omnipoint Opposition at 13-14 (before licensees are required to make irreversible elections, the Commission should issue final decisions on the note interest rate, the procedures for implementing resumption of payments, election filing procedures, the Commission's position on bankruptcy, and the role of the Department of Justice). MFRI asks that the election date be postponed until the bid signaling practices in the D, E, and F block auction have been resolved. MFRI Petition at 3. We note that on September 5, 1997, the Commission announced the implementation of click-box bidding, one purpose of which is to prevent bid signaling practices. See "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," *Public Notice*, 12 FCC Rcd 13,449 (WTB 1997).

Report and Order, and we believe that 60 days after publication in the *Federal Register* will provide sufficient time for any reevaluation that may be necessary in light of the modifications we make in this *Order*.[154]

64. We disagree with Omnipoint that NextWave should be required to make its election in advance of other C block licensees.[155] Omnipoint claims that NextWave is so dominant in the market that its election decision will have a dramatic impact on the relative value of choices made by the other licensees.[156] Omnipoint argues that, for example, other licensees might be reluctant to surrender spectrum if they knew NextWave was keeping its spectrum because reauction opportunities would be severely limited without the return of any NextWave licenses.[157] We agree with NextWave that all C block licensees should be treated equally, and we will not discriminate against one licensee in order to grant others a competitive advantage.[158]

65. In the *Second Report and Order*, the Commission inadvertently omitted reference to the requirement that F block licensees execute fully and deliver timely all necessary financing documents. Consequently, we now clarify that F block licensees, as well as C block licensees, must execute and deliver all necessary financing documents pursuant to

---

[154] *See* Northern Michigan Petition at 10 (the election date should be at least 60 days after the release of the order on reconsideration of the *Second Report and Order*).

[155] Omnipoint Petition at 6-8; Omnipoint Reply at 2-5.

[156] Omnipoint Petition at 6.

[157] *Id.* at 7-8.

[158] NextWave Opposition at 2.

appropriate requirements and time frames as will be established by the Bureau in a forthcoming public notice on procedures. We modify the *Second Report and Order* to require both C and F block licensees that fail to execute fully and deliver timely to the Commission any required financing documents to pay on the payment resumption date all unpaid simple interest accruing from the date of license grant through the payment resumption date.[159] The Bureau's forthcoming public notice also will set forth updated election procedures for C block licensees, reflecting our modifications to the *Second Report and Order*.

X. REAUCTION

A. Timing

66. On January 7, 1998, we announced that the C block reauction would begin on September 29, 1998.[160] In light of the postponement of both the election date and the payment resumption date, as discussed above, it will be necessary to establish a new reauction date. We delegate to the Bureau the authority to establish the reauction date. We instruct the Bureau to issue a public notice announcing the new date at

---

[159] *See Second Report and Order*, 12 FCC Rcd at 16,471 para. 76 (requiring payment of all Suspension Interest, which included interest only through the previous payment resumption date of March 31, 1998).

[160] *See Election Date Order I* at para. 3. The Commission has proposed including the following licenses in the reauction: (1) all licenses representing the disaggregated spectrum surrendered to the Commission under the disaggregation option; (2) all licenses surrendered to the Commission by licensees taking advantage of the Commission's prepayment or amnesty options; and (3) all PCS C block licenses currently held by the Commission as the result of previous defaults. *See Further Notice*, 12 FCC Rcd at 16,474 para. 83.

least three months in advance of the start of the reauction.

67. CPCSI, a winning bidder for nine licenses in the C block auction whose license grants were subject to resolution of an Application for Review pending at the time of the release of the *Second Report and Order*, asks the Commission not to begin the reauction until final action on its Application for Review or, in the event no such action occurs, until the Pocket and GWI bankruptcy proceedings conclude.[161] Because the Commission granted CPCSI's Application for Review on December 24, 1997,[162] CPCSI's request is moot and there is no need to address the merits of CPCSI's request.

B. Eligibility

1. Background

68. The *Second Report and Order* specified that all entrepreneurs, all entities that had been eligible for and had participated in the original C block auction, and all current C block licensees would be eligible to bid in the reauction.[163] The Commission, however, created an exception for

---

[161] CPCSI Petition at 4-9. *But see* AirGate Opposition at 16 (encouraging the Commission to reject CPCSI's Application for Review in time for those licenses to be included in the reauction and arguing that the reauction should not be delayed by the bankruptcy proceedings).

[162] *See* Carolina PCS I Limited Partnership Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding BTA Nos. B016, B072, B091, B147, B177, B178, B312, B335, and B436, Frequency Block C, *Memorandum Opinion and Order*, FCC 97-417 (released December 24, 1997).

[163] *Second Report and Order*, 12 FCC Rcd at 16,448 para. 22; *see also Further Notice*, 12 FCC Rcd at 16,474 para. 84.

incumbent licensees: for a period of two years from the start date of the reauction, C block licensees (defined as qualifying members of the licensee's control group, and their affiliates) that opted for the disaggregation or prepayment options would be prohibited from reacquiring, either through the reauction or through any secondary market transaction, any spectrum or licenses that they surrendered to the Commission under those options.[164] Such licensees, however, would be permitted to bid on spectrum or licenses surrendered by other licensees, provided that such licensees were not affiliates.[165] Licensees electing the amnesty option would be eligible to bid for any and all licenses at the reauction, with no restrictions on post- auction acquisitions.[166]

2. Discussion

69. The only reauction eligibility issues set forth in the *Second Report and Order* ripe for reconsideration in this phase of the proceeding are those related directly to whether and how a licensee's election of a particular payment option should affect its eligibility to participate in the reauction of, or reacquire an ownership interest in, surrendered spectrum. We defer to other phases of WT Docket No. 97-82 additional eligibility issues, including the qualifications of entities that have defaulted on payments to participate in the reauction[167] and the use of a "controlling interest" approach rather than

---

[164] *Second Report and Order*, 12 FCC Rcd at 16,457, 16,470 paras. 42, 69.

[165] *Id.*, 12 FCC Rcd at 16,457 para. 42; *see also id.*, 12 FCC Rcd at 16,470 para. 69.

[166] *Id.*, 12 FCC Rcd at 16,462 para. 54.

[167] Comment is sought on this issue in the *Further Notice*, 12 FCC Rcd at 16,474 para. 84.

"control group" structures to determine financial size in the C block, as well as in all auctionable services.[168] We note that, in its comments filed in response to the *Further Notice*, Nextel Communications, Inc. challenges the Commission's ruling in the *Second Report and Order* that participation in the C block reauction is limited to qualified entrepreneurs.[169] In their petitions for reconsideration, Cellexis and RFW respond to Nextel's arguments and urge the Commission not to reconsider its decision.[170] We address Nextel's challenge here, notwithstanding the fact that Nextel's request was not filed as a petition for reconsideration of the *Second Report and Order*. We conclude that Nextel has not provided a convincing rationale for deviating from the public interest goals articulated by the Commission in the *Second Report and Order*.[171] Consequently, we affirm the Commission's earlier ruling to limit eligibility for participation in the reauction to applicants meeting the current definition of

[168] NextWave Petition at 20; *accord* Duluth PCS, et al. Opposition at 4-5; Polycell Opposition at 4-5; *cf.* AmeriCall Opposition at 7-8 (arguing that the 10 percent control group institutional investor rule, 47 C.F.R. § 24.709(b)(5)(i)(C), and the 25 percent nonattributable ownership limit, 47 C.F.R. § 24.709(b)(3)(i), should be eliminated because they unnecessarily restrict access to capital from noncontrolling investors). Comment is sought on this issue in *Part I Third Report and Order*; *see also* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5693 n.17, 5703 paras. 11, 28 (1997).

[169] *See* Comments filed by Nextel Communications, Inc. on November 13, 1997 at 7-9.

[170] *See* Cellexis Petition at 7-8; RFW Petition at 6-7. *See also* MFRI Reply at 6-7 (expressing concern that large incumbents advocate opening the C block reauction to all bidders); Wireless Ventures Reply at 4 (same).

[171] *See Second Report and Order*, 12 FCC Rcd at 16,448 para. 22.

"entrepreneur."[172]

70. On reconsideration, we make a change to the eligibility requirements, which already has been discussed above, and also a clarification. As we stated previously, a licensee that elects the amnesty option for an MTA and opts to receive partial credit for down payments on its returned licenses in that MTA will not be eligible to reacquire those licenses through either reauction or any secondary market transaction for a period of two years from the start date of the reauction. This restriction also applies to the licensee's affiliates. Likewise, if a licensee disaggregates an MTA, neither it nor its affiliates may bid on the returned spectrum in the reauction or reacquire it through a secondary market transaction for two years after the start date of the reauction. Licensees that return licenses under the amnesty option or spectrum under the disaggregation option are not precluded from bidding in the reauction on licenses or spectrum returned by other non-affiliated licensees (or from later reacquiring those licenses or spectrum in post-auction transactions). We clarify that the term "affiliate" is defined by our competitive bidding rules in the *Part I Third Report and Order*.[173]

71. Several parties believe that we should revise our bidding eligibility requirements.[174] Sprint, for example,

[172] *Id.*

[173] 47 C.F.R. § 1.2110(b)(4); *Part I Third Report and Order* at paras. 29-30.

[174] *Compare* Northern Michigan Petition at 6 (licensees electing disaggregation should be allowed to participate in the reauction) and Cellexis Petition at 6 (the C block reauction should be open to all non-defaulting C block licensees, irrespective of the chosen option) *with*

agrees with the Commission's decision to exclude C block licensees that choose disaggregation or prepayment from bidding on their surrendered spectrum at reauction, but contends that the Commission undermines the integrity of the auction process by not similarly limiting the ability of licensees that select the amnesty option.[175] Sprint believes that the lack of such a restriction will unjustly enrich licensees that select the amnesty option and then bid for the same spectrum at a likely discount.[176] NextWave, on the other hand, claims it is unreasonably discriminatory to preclude entities choosing disaggregation or prepayment from reacquiring their surrendered spectrum for two years while allowing entities choosing the amnesty option to reacquire their spectrum immediately either by reauction or through secondary markets.[177]

72. We believe our modified approach addresses both these arguments. In response to NextWave, we note that licensees electing disaggregation and/or prepayment for one MTA now can choose to return licenses in other MTAs and bid on those licenses in the reauction. However, in response to Sprint, we point out that licensees electing amnesty for an MTA must forgo their entire down payment if they wish to bid on their returned licenses for that MTA. We believe that this cost sufficiently mitigates any concern of unjust enrichment.

Antigone/Devco Opposition at 5-6 (bidders electing any of the special relief options should be barred from participating in any future C block reauctions).

[175] Sprint Petition at 3-4.

[176] *Id.* at 2-3; Sprint Opposition at 3.

[177] NextWave Petition at 18-19; *accord* Polycell Opposition at 8-9; Duluth PCS, et al. Opposition at 8-9.

XI. MISCELLANEOUS MATTERS

A. Cross Defaults

73. The *Second Report and Order* provided that if a licensee defaulted on a C block license, the Commission would not pursue cross default remedies with regard to the licensee's other licenses in the C or F blocks.[178] In other words, if a licensee defaulted on a given C block license but was meeting its payment obligations on its other C or F block licenses, the Commission would not declare the licensee to be in default with respect to those other C or F block licenses.[179] We disagree with CIRI that, by not imposing cross default remedies, we encourage auction participants to bid speculatively and then "cherry-pick" among the licenses they ultimately decide to keep by simply defaulting on the ones they no longer desire.[180] As explained earlier, we have implemented numerous procedures to safeguard against "cherry-picking." Moreover, we believe that by not imposing cross default remedies, we encourage regional financing. Even if a licensee's holdings in one region have proven unattractive to the financial market, the same licensee's holdings in other markets may be financially sound. Therefore, we will not depart from the decision in the *Second Report and Order*. We note that licensees that ultimately default will continue to be subject to debt collection procedures.[181]

---

[178] *Second Report and Order*, 12 FCC Rcd at 16,472-73 para. 79.

[179] *Id.*

[180] *See* CIRI Petition at 6-8. *But see* AmeriCall Opposition at 8-11 ("Suffering default penalties is not an encouragement to 'cherry-pick.'").

[181] 47 C.F.R. § 1.2110(f)(4)(iv).

B. No Extension of C Block Relief to Other Licensees

74. We reject various requests to grant F block licensees the same relief provided to C block licensees.[182] Cellular Holding contends that C and F block licensees should be treated similarly because: (1) both are licensed to provide broadband PCS; (2) they were granted their licenses within 7.5 months of one another; (3) Section 24.709 of the Commission's rules governs bidder eligibility for both blocks; (4) their market boundaries are identical; (5) they will have nearly the same amount of spectrum if C block licensees choose disaggregation; and (6) they both compete with larger, more experienced competitors that received a head-start.[183] Cellular Holding, however, ignores the fact that C and F block licensees are not similarly situated with respect to the most relevant factor -- the need for financial relief.

75. After careful review, the Commission determined in the *Second Report and Order* that "the nature and extent of any financing difficulties faced by the C block licensees appear to be different from any such problems facing entrepreneurs in the F block."[184] C block prices were higher, on average, than F block prices.[185] We disagree with several parties that argue

---

[182] Central Oregon Petition at 2-4; Cellular Holding Petition at 2-5; Duluth PCS, et al. Opposition at 10; Polycell Opposition at 10; Eldorado Reply at 2-4.

[183] Cellular Holding Petition at 2-3.

[184] *Second Report and Order*, 12 FCC Rcd at 16,447 para. 20.

[185] *See* "D/E/F Band PCS Auction Results in Lower Spectrum Prices But Another Win for CDMA Proponents," U.S. Telecommunications, SBC Warburg Inc. (January 28, 1997) (D, E, and F spectrum prices 75 percent lower than C band auction); Donaldson, Lufkin & Jenrette, The Wireless Communications Industry (Spring 1997) at 20 ("D, E and F Auction Prices

that the Commission's explanation in the *Second Report and Order* fails to justify disparate treatment.[186] The difficulties in financing the unexpectedly high prices bid in the C block auctions is a sufficiently distinguishing basis for limiting relief to C block licensees. As further justification, we agree with AmeriCall that the C block situation was the result of a unique set of mostly unpredictable events, including litigation and resulting licensing delays and the lack of a simultaneous non-entrepreneur auction that could have been used to ease price pressures.[187]

76. The need for C block relief was due to exceptional and urgent circumstances, and because it is essential to maintain the integrity of the auction process, only the most exigent situation would cause us to offer such relief. Even in addressing the C block financing situation, the Commission provided options that offered only limited relief so as to be fair to bidders that withdrew from the auction. We therefore are not persuaded by Central Oregon's claim that F block licensees should be granted relief because A, B, and C block licensees have a competitive advantage given their earlier licensing date and their larger amounts of spectrum.[188] We also reject Omnipoint's argument that C block options should be available to entrepreneurs with D, E, and F block licenses because C block relief will change the relative values of those licenses.[189] These arguments do not present sufficiently

---

Surprisingly Low").

[186] *See* Central Oregon Petition at 2-4; Omnipoint Opposition at 12; Eldorado Reply at 3-4.

[187] AmeriCall Opposition at 3-4. *See also* NextWave Reply at 3.

[188] Central Oregon Petition at 2-4.

[189] Omnipoint Petition at 9-10; Omnipoint Opposition at 11-12.

compelling reasons to apply the "extraordinary procedures" we adopted for C block licensees to D, E, and F block licensees.[190] In addition, CONXUS, the only party to address this issue, argues that narrowband PCS entities should receive relief comparable to that afforded C block licensees because they compete in the same consumer and financial markets and face similar circumstances.[191] The record in this reconsideration proceeding is insufficient to adopt global changes effecting narrowband PCS entities, but we note that payment matters for these entities are currently being examined in another proceeding before the Commission.[192]

C. Issues Addressed in Other Proceedings or Requiring Action by Congress

77. A number of parties make requests involving issues either that will be, or have been, addressed in other proceedings or that require action by Congress. For example, several petitioners urge the Commission to reduce the interest rate for C block installment payments.[193] The Bureau will

---

[190] *Second Report and Order*, 12 FCC Rcd at 16,437-38 para. 2.

[191] CONXUS Petition at 3-5; CONXUS Opposition at 2-8; CONXUS Reply at 4-10. CONXUS claims its experience is similar to the C block situation, including delays in market entry, its problems in raising capital, high bid amounts, a post-auction rule change, and the lack of a simultaneous non-entrepreneur auction.

[192] *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Narrowband PCS, PP Docket No. 93-253, *Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12,972 (1997).

[193] Northern Michigan Petition at 8-9 (interest rate for C block licensees should be standardized at 6.5 percent); Alpine Petition at 11-12 and Alpine Reply at 6-8 (interest rate should be reduced to 5.56 percent); McBride Petition at 4 (the Commission should set the interest rate uniformly

address this issue in a forthcoming order. With respect to Northern Michigan's request that we allow commercial lenders to acquire a security interest in licenses, we note that we previously resolved the issue in another proceeding.[194]

78. TAP encourages the Commission to seek Congressional authority to award tax certificates to entities that provide investment capital to C block licensees.[195] Section 309(j)(4)(D) of the Communications Act mandates that, in seeking to ensure that designated entities are "given the opportunity to participate in the provision of spectrum-based services," the Commission shall "consider the use of tax certificates."[196] By allowing a tax deferral of the gain realized on an investment, tax certificates provide a significant means of enhancing the value of an investment in an enterprise, and we believe that a tax certificate program for spectrum-based services would be as beneficial to the wireless industry as the Commission's tax certificate programs were for the broadcast and cable industries.[197] However, in view of Congress' repeal

---

at 5.75 percent).

[194] Northern Michigan Petition at 8. *See also* McBride Petition at 4. Our position on this issue was addressed in Amendment of Part I of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, FCC 97-60 (released February 28, 1997) at para. 12 ("debtors may grant to other parties a subordinated security interest in the proceeds of an authorized assignment or transfer of the license to a third party, provided however that any such security interest shall be subordinated to and in no way inconsistent with the Commission's security interest in the license").

[195] TAP Reply at 4-10. *See also* McBride Petition at 5.

[196] Communications Act § 309(j)(4)(D), 47 U.S.C. § 309(j)(4)(D).

[197] *See* TAP Reply at 5-6 (citing Erwin G. Krasnow, "A Case for Minority Tax Certificates," Broadcasting & Cable, December 15, 1997, at 80) (the Commission's tax certificate program greatly increased minority

in 1995 of Section 1071 of the IRS Code,[198] which granted the Commission authority to use tax certificates to promote Commission policies, we believe that legislative action would be necessary before we could provide such tax relief. Accordingly, we urge Congress to review the positive impact of the Commission's previous tax certificate programs and to grant us the authority to establish a similar program for wireless enterprises, which we believe would promote competition in the telecommunications industry by encouraging investment in new services.

XII. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Supplemental Final Regulatory Flexibility Analysis

79. The Supplemental Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is attached at Appendix C.

B. Paperwork Reduction Act Analysis

80. This Order contains a modified information collection that was submitted to the Office of Management and Budget requesting emergency clearance under the Paperwork Reduction Act of 1995.

---

ownership of broadcast and cable entities and "gave minority entrepreneurs increased access to the market for broadcast and cable properties, gave them a chip at the bargaining table and opened doors at financial institutions that had been closed").

[198] Pub. L. No. 104-7, § 2, 109 Stat. 93, 93-94 (1995).

C. Ordering Clauses

81. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the petitions for reconsideration filed in response to the *Second Report and Order* are GRANTED IN PART and DENIED IN PART, as provided herein.

82. IT IS FURTHER ORDERED that, pursuant to the authority granted in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the modifications to the Commission's rules, as described herein and in Appendix B, ARE HEREBY ADOPTED. These modifications shall become effective 60 days after publication of this Order on Reconsideration of the *Second Report and Order* in the *Federal Register*.

83. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. § 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein.

84. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Order on Reconsideration of the *Second Report and Order*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

Petitions for Reconsideration

1. Airtel Communications, Inc. ("Airtel")
2. Alpine PCS, Inc. ("Alpine")
3. AmeriCall International, L.L.C. ("AmeriCall")
4. Carolina PCS I Limited Partnership ("CPCSI")
5. Cellexis International, Inc. ("Cellexis")
6. Cellnet ("Cellnet")
7. Cellular Holding, Inc. ("Cellular Holding")
8. Central Oregon Cellular, Inc. ("Central Oregon")
9. Christensen Engineering & Surveying ("Christensen")
10. ClearComm, L.P. ("ClearComm")
11. CONXUS Communications, Inc. ("CONXUS")
12. Cook Inlet Region, Inc. ("CIRI")
13. CVI Wireless
14. DiGiPH PCS, Inc. ("DiGiPH")
15. Federal Network
16. Fox Communications
17. General Wireless, Inc. ("GWI")
18. Horizon Personal Communications, Inc. ("Horizon")
19. Hyundai Electronics America ("Hyundai")
20. Koll Telecommunication Services ("Koll")
21. Leifer, Marter Architects ("Leifer, Marter")
22. McBride, Vincent ("McBride")
23. Meretel Communications, L.P. ("Meretel")
24. MFRI Incorporated ("MFRI")
25. NextWave Telecom Inc. ("NextWave")
26. New Wave Inc. ("New Wave")
27. Northern Michigan PCS Consortium L.L.C. and Wireless 2000, Inc. ("Northern Michigan")
28. Omnipoint Corporation ("Omnipoint")

29. One Stop Wireless of America, Inc. ("One Stop Wireless")
30. OnQue Communications, Inc. ("OnQue")
31. Prime Matrix Wireless Communications ("Prime Matrix")
32. RFW PCS Inc. ("RFW")
33. Sprint Corporation ("Sprint")
34. United Calling Network, Inc. ("UCNI")
35. Urban Communicators PCS Limited Partnership ("Urban Communicators")
36. URS Greiner, Inc. ("URS Greiner")
37. Wireless Nation, Inc. ("Wireless Nation")

Oppositions

1. AirGate Wireless, L.L.C. ("AirGate")
2. ALLTEL Communications, Inc. ("ALLTEL")
3. AmeriCall International, L.L.C. ("AmeriCall")
4. Antigone Communications Limited Partnership and PCS Devco, Inc. ("Antigone/Devco")
5. AT&T Wireless Services, Inc. ("AT&T")
6. ClearComm, L.P. ("ClearComm")
7. CONXUS Communications, Inc. ("CONXUS")
8. Duluth PCS, Inc., St. Joseph PCS, Inc., and West Virginia PCS, Inc. ("Duluth PCS, et al.")
9. Fidelity Capital
10. MFRI Incorporated ("MFRI")
11. NextWave Telecom Inc. ("NextWave")
12. Northcoast Communications, L.L.C. ("Northcoast")
13. Omnipoint Corporation ("Omnipoint")
14. Polycell Communications, Inc. ("Polycell")
15. PrimeCo Personal Communications, L.P. ("PrimeCo")
16. Sprint Corporation ("Sprint")
17. Third Kentucky PCS "Third Kentucky")

Replies to Oppositions

1. Alpine PCS, Inc. ("Alpine")
2. Cellexis International, Inc. ("Cellexis")
3. ClearComm, L.P. ("ClearComm")
4. CONXUS Communications, Inc. ("CONXUS")
5. CX Systems Int'l, Inc. ("CX Systems")
6. Eldorado Communications, L.L.C. ("Eldorado")
7. Federal Network
8. Frontier Corporation ("Frontier")
9. Hyundai Electronics America ("Hyundai")
10. MFRI Incorporated ("MFRI")
11. NextWave Telecom Inc. ("NextWave")
12. Omnipoint Corporation ("Omnipoint")
13. RFW PCS Inc. ("RFW")
14. Telecommunications Advocacy Project ("TAP")
15. Third Kentucky Cellular Corp. ("Third Kentucky")
16. Wireless Ventures, Inc. ("Wireless Ventures")

Ex Parte Filings

1. AirGate Wireless, L.L.C. ("AirGate"), February 9, 1998
2. AmeriCall International, L.L.C. ("AmeriCall"), March 12, 1998
3. Christensen Engineering & Surveying ("Christensen"), December 19, 1997
4. ClearComm, L.P. ("ClearComm"), February 23, 1998
5. ClearComm, L.P. ("ClearComm"), March 13, 1998
6. Congressman Gary L. Ackerman, January 15, 1998
7. Congressman Xavier Becerra, February 3, 1998
8. Congresswoman Sue W. Kelly, December 31, 1997
9. Congressman Albert R. Wynn, February 9, 1998
10. CX Systems Int'l, Inc. ("CX Systems"), December 10, 1997

11. Cyber Sites, L.L.C. ("Cyber Sites"), December 1, 1997
12. Datacomm Research Company, February 20, 1998
13. Dorne & Margolin, December 1, 1997
14. Florida Power Corporation ("Florida Power"), December 19, 1997
15. Gilder Technology Group, Inc., February 16, 1998
16. Joint filing by 43 companies, February 20, 1998
17. Kabbara Engineering ("Kabbara"), December 26, 1997
18. LaBarge Clayco Wireless, L.L.C. ("LaBarge Clayco"), December 24, 1997
19. Leifer, Marter Architects ("Leifer, Marter"), December 17, 1997
20. Members of the Congressional Hispanic Caucus, February 5, 1998
21. MJA Communications Corp. ("MJA"), December 22, 1997
22. New Wave Inc. ("New Wave"), January 20, 1998
23. New Wave Inc. ("New Wave"), February 17, 1998
24. NextWave Telecom Inc. ("NextWave"), January 21, 1998
25. OPM USA, Inc. ("OPM"), December 23, 1997
26. Praxis Telecom, January 26, 1998
27. Prudential Securities Inc., February 26, 1998
28. R&S PCS, Inc., February 11, 1998
29. RFW PCS Inc. ("RFW"), December 23, 1997
30. Senator Barbara Boxer, February 13, 1998
31. Senators Richard H. Bryan and Harry Reid, January 29, 1998
32. Senator Thomas Daschle, February 11, 1998
33. Senator J. Robert Kerrey, February 12, 1998
34. Specialty Teleconstructors Inc. ("Specialty Teleconstructors"), December 19, 1997
35. Structure Consulting Group ("Structure Consulting"), December 22, 1997

36. Wireless Nation, Inc. ("Wireless Nation"), January 23, 1998
37. Xway, Inc. ("Xway"), December 16, 1997
38. 2001 Personal Communication, Inc., January 8, 1998

APPENDIX B

Revised Rules

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 - PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: 15 U.S.C. 79 et seq.; 47 U.S.C. 151, 154(i), 154(j), 155, 225, and 303(r), unless otherwise noted.

2. Section 1.2110 is amended by revising paragraph (f)(4)(ii), (iii), (iv) to read as follows:

§ 1.2110 Designated Entities

*****

(f) ***

(4) ***

(i) ***

(ii) If any licensee fails to make the required payment at the close of the 90-day period set forth in subsection (i) above, the licensee will automatically be provided with a subsequent 90-day grace period, except that no subsequent automatic grace period will be provided for payments from C or F block licensees that are not made within 90 days of the payment resumption date for those licensees, as explained in

Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998). ***

(iii) If an eligible entity making installment payments is more than one hundred and eighty (180) days delinquent in any payment, it shall be in default, except that C and F block licensees shall be in default if their payment due on the payment resumption date, referenced in subsection (ii) above, is more than ninety (90) days delinquent.

(iv) Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period, if such a grace period is available, will be declared in default, its license will automatically cancel, and will be subject to debt collection procedures.

*****

Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 24 - PERSONAL COMMUNICATIONS SERVICES

3. The authority citation for Part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309 and 332, unless otherwise noted.

4. Section 24.709 is amended by revising paragraph (b)(9)(i), (ii) (A) - (B) to read as follows:

§ 24.709 Eligibility for licenses for frequency Blocks C and F.

(a) ***

(b) ***

(9) *Special rule for licensees disaggregating or returning certain spectrum in frequency block C.*

(i) In addition to entities qualifying under this section, any entity that was eligible for and participated in the auctions for frequency block C, which began on December 18, 1995, and July 3, 1996, will be eligible to bid in a reauction of block C spectrum surrendered pursuant to Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998).

(ii) The following restrictions will apply for any reauction of frequency block C spectrum conducted after March 24, 1998:

(A) Applicants that elected to disaggregate and surrender to the Commission 15 MHz of spectrum from any or all of their frequency block C licenses, as provided in Amendment of the Commission's Rules Regarding Installment Payment

Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998), will not be eligible to apply for such disaggregated spectrum until 2 years from the start of the reauction of that spectrum.

(B) Applicants that surrendered to the Commission any of their frequency block C licenses, as provided in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998), will not be eligible to apply for the licenses that they surrendered to the Commission until 2 years from the start of the reauction of those licenses if they elected to apply a credit of 70% of the down payment they made on those licenses toward the prepayment of licenses they did not surrender.

(C) ***

* * * APPENDIX C OMITTED * * *

Statement of Commissioner Susan Ness Concurring in Part, Dissenting in Part

Re: Amendment of the Commission's Rules Regarding Installment Payment Financing for C block Personal Communications Service (PCS) Licensees, WT Docket No. 97-82

I concur in today's decision to the extent it affirms the Commission's decision of September 25, 1997, and dissent to the extent it does not. I am pleased that the majority has generally adhered to the framework established last fall. But I do not support the revised package of options being afforded to C block licensees, which I believe is an excessive and potentially counterproductive government intervention in the marketplace. In addition, I am troubled by the majority's willingness to indefinitely delay reauction of returned licenses.

My disagreements with the majority are real, and they are substantial, but they are also respectful. As with many of the judgments the Commissioners are called upon to make, reasonable people can disagree. So here.

Although I supported the Commission's prior decision, I have welcomed the opportunity to think anew on these issues. Reconsideration presents an opportunity -- and a duty -- to consider the matter with a fresh eye. I have used the reconsideration process to test the facts and logic undergirding the Commission's prior decision, to seek additional information and ideas, and to deliberate with a new group of colleagues who bring diverse backgrounds and fresh insights to the process.

And yet this process has left unshaken the core convictions that were central to my thinking last September. Spectrum auctions cannot achieve their full promise as a method of assigning rights to use the public airwaves if, after the fact, government interposes itself into the marketplace to alter market outcomes and favor one group of competitors over another group of competitors.

It remains my view that the C block auction, like the other spectrum auctions the Commission has administered, was run fairly. At the time of the auction, the playing field was level. Everyone believed they were playing by the same rules. Each bidder was on notice to take our rules into consideration when they bid, including the installment terms. Every bid, by every bidder, was entirely voluntary.

As prices rose, some bidders dropped out, believing that others were misjudging the market, and banked on the opportunity to obtain licenses in the event of defaults, license cancellation, and reauction -- the way the FCC said it would work. Others, judging the market potential differently, stayed in. The FCC owes an equal duty to all of these bidders. In my view, today's decision breaches that duty.

In September, we departed in a limited fashion from strict adherence to market mechanisms, and the majority has now moved further down the slippery slope. In the wake of today's decision, we can reasonably anticipate that these licensees, or those in other spectrum blocks, will seek other accommodations on future occasions. This is the inevitable result when government too readily intervenes to protect market participants from failure.

The real damage here is to our role as steward of the public

airwaves. Our responsibilities are to facilitate use of the spectrum to bring competitive services to the public, to be fair to all parties (licensees and disappointed bidders alike), and to rely on marketplace forces rather than government edict to select winners and losers. Having placed spectrum in an auction with fair rules known to all parties, we should not intrude on the marketplace after the auction for the purpose of assisting some parties to remain licensees. The marketplace is far better suited than we are to determine the capabilities of licensees, and to provide support for those business plans that make economic sense.

Moreover, financial markets need regulatory certainty and predictability of outcomes. Otherwise the regulatory risk is too great to warrant investment. Wall Street needs the C block licensees to get on with business. Our September decision met with some applause, in part because it contributed certainty to the marketplace and allowed participants, equipment manufacturers, and suppliers of venture capital to proceed. The measures the majority takes today regretfully foster more uncertainty and unpredictability.

Specific Concerns

Although the majority has maintained the basic framework of the decision rendered last September, there are fundamental differences between what the Commission did then and what it is doing now. The new approach will entail greater governmental intrusion in the marketplace, more disruption of business plans, and more delays in C block construction and operation.

The options afforded last September were painstakingly tailored to maintain consistency with auction results and to

speed the resumption of normal operation of the market. These options were designed to enable some licensees to exit their predicaments; others to regroup; and still others to refocus their energies on executing their business plan. Given the growing competition in the wireless marketplace, I believed it to be important to enable those C block licensees which were able to do so to "get back to business" as soon as possible. For that reason, one virtue of the options set forth in our September decision was that they were designed to give a modest hand to those most in need, not to create incentives for those licensees capable of proceeding under their original agreements to abandon their business plans.

As noted above, the majority is retaining the basic framework of September's decision, but changing it in significant ways. Today's decision: (1) increases the ability of licensees to credit deposits that otherwise would be forfeit; (2) allows some deposits to be applied against suspension interest; (3) permits licensees to choose among the options on an MTA-by-MTA basis; (4) extends the time when licensees need to either resume their payments or face cancellation of their licenses; and (5) indefinitely postpones the reauction. Taken in combination, the new array of options is complex, confusing, and overly intrusive in the marketplace.

The decision today takes what had been a menu of measured options and turns it into a smorgasbord of hearty choices. The enriched menu of options adopted today may compel all C block licensees to stop and reassess their business plans. Each will now feel obligated to consider whether changing its plans would be more advantageous than proceeding in accordance with the original auction outcome; and many will do so. It is ill-advised and unnecessary to offer new terms that will alter the plans of licensees who were otherwise

prepared to proceed. This has extended the delay in settling the C block, and adds to the uncertainty in the financial markets. And most important, we are interfering with market correction mechanisms that would ensure that C block licenses are held by entrepreneurs financially able to provide service to the public.

Use of Down Payments

Of the changes to the plan adopted last September, I am most troubled by those pertaining to the disaggregation option. Previously, those choosing disaggregation were required to forfeit the down payments associated with the portion of the spectrum that was being returned; now, they may use a portion of these funds.[1] But these funds do not belong to a licensee that cannot meet its commitments -- any more than do those paid for an option to buy land that has lapsed or a downpayment on a car that has been repossessed. Yet the majority allows these funds to be used to pay down principal on the licenses that are kept or, worse, to pay suspension interest.

---

[1] The prior decision allowed licensees to redeploy a portion of their down payments only in one limited circumstance -- prepayment. The key considerations that made this approach acceptable to me were that: (1) such licensees were paying the full bid amount on the licenses they retained; and (2) election of this option removed the government entirely from installment payments -- some licenses were fully purchased, and the remaining licenses were returned to the FCC for reauction. The result was that the electing licensee was relieved of suspension interest and all debt owed, in return for purchasing or returning all licenses. The same benefits do not accrue in the disaggregation context, where the licensee continues to receive below-market interest rates and the government continues to administer installment debt.

Using deposits that would otherwise be forfeited to pay suspension interest essentially postpones the time when the licensee's financial ability to construct and operate a service is put to the test. It also is not fair to the licensees who met their obligations and who must raise the money to cover suspension interest payments.

Delays in Resumption of Payments and Reauction

I am also troubled by yet another extensive delay before the date by which licensees will need to resume payments on their licenses. Until such payments are made, the market will not know which licensees are financially viable. The payments already have been suspended for one year. Now, additional time is needed for licensees to sort out their expanded options. At the same time, the grace period for delayed payments is being extended. So we prolong the time during which the licenses will be tied up, with no assurance that the licensees will ultimately be able to finance and construct their systems and provide service to the public.

In addition, I am concerned by the further delay in the timing of the reauction of forfeited licenses. A reauction is needed to put licenses in the hands of those capable of putting them to productive use. It will also create long-awaited opportunities for those designated entities that, in the prior auction, consciously and responsibly chose not to bid more than they could pay. And yet, in today's order, the majority indefinitely postpones the reauction. Last year, we said it would occur in the third quarter of 1998. Just two months ago, the new Commission committed to a date of September 29, 1998. Now, the reauction is deferred until further notice.

Still more delay is inherent in the Commission's inaction on

rules for the C block reauction. These rules were proposed in the same September order that here is under reconsideration and for which the comment period has ended. Yet even though decisions on some issues in that proceeding could affect the elections from among the newly expanded options, the majority has declined to settle those issues today.

Competing Objectives

The agency is caught between conflicting concerns. Everyone agrees, at least as a general principle, that it is vital to maintain the integrity of the auction process. Yet we naturally are drawn to help C block licensees who are facing hardship. Behind the corporate names printed on the licenses and the petitions for relief stand real people -- small business owners, entrepreneurs, individual investors, and others, many of them women and minorities -- facing real problems. I -- like my colleagues -- am drawn to help them.

But it is impossible to fully reconcile a commitment to fair market-driven spectrum assignments with a willingness to change the rules of the game after it has been played. At some point, one objective must prevail over the other. In my judgment, where the objectives collide, the integrity of the process must control, and the desire to help individual players must yield.

If we really believe in assigning spectrum by auctions as authorized by Congress in the Omnibus Budget Reconciliation Act of 1993, and the "procompetitive, deregulatory" paradigm of the Telecommunications Act of 1996, we must accept the reality that some licensees will fail in the marketplace, and that their conditional licenses will need to be canceled and reauctioned, as our rules envisioned.

Such outcomes are painful, but necessary, if the marketplace is to work its magic.

My disagreement with the majority concerns the lengths to which the Commission should go in trying to prevent such outcomes.

Judges and legislators, lawyers and economists -- all speak to the need to promote and protect competition, not competitors. In my opinion, today's decision crosses the line to favor specific competitors over others. I cannot support that result.

Some parties have suggested that the Commission owes a duty to go to extra lengths because the C block licensees are all small business "designated entities." This argument misses the point that, with or without post hoc relief, the C block spectrum will remain exclusively for designated entities. What is at issue is a clash not between the interests of small entities and those of large conglomerates. Rather, the issue is whether the FCC should favor one group of designated entities over another. I do not believe it should.

The Commission's Role

The Commission's intervention in the post-auction market is neither compelled nor excused by the ongoing financial obligation of the C block licensees to the U.S. Treasury. The Commission's fundamental role is that of a licensing agency, not that of a lender. Although the agency's C block rules enabled designated entities to purchase spectrum rights with installment payments, as Congress specifically contemplated (47 U.S.C. § 309(j)(4)(A)), our responsibility after the auction was to issue licenses, which were expressly

conditioned upon the licensees' fulfillment of their financial commitments.

Those who say the Commission functioned as a banker are mistaken. We never performed the banker's role (which I know well) of reviewing the bidders' balance sheets, their business plans, the wisdom of their planned bids, and the quality of their management. We never assumed the responsibility of creating "commercially reasonable alternatives" for whatever difficulties the C block licenses encountered. To the contrary, we repeatedly declared our commitment to the efficacy of the market mechanism, and our intention to enforce auction rules.[2]

Conclusion

Today's decision may enable the survival of some C block licensees who might have failed without government intervention. More likely is the prospect that the significantly sweetened selection of options will lead directly to more churn in business plans, more deviation from initial auction

---

[2] I note that the Commission acted without hesitation when some successful C block bidders failed to make their down payments although they had made their deposits. The FCC immediately defaulted the bidders and assessed maximum forfeitures, applying all payments to the forfeitures. *See* "18 Defaulted PCS licenses to be Reauctioned; Reauction to Begin July 3rd," *Public Notice*, DA 96-872 (rel. May 30, 1996); *Mountain Solutions LTD, Inc.*, *Order*, 12 FCC Rcd 5904 (WTB 1997), application for review pending; *BDPCS, Inc.*, *Order*, 12 FCC Rcd 6606 (WTB 1997), application for review pending; *C.H. PCS Inc.*, *Order*, 11 FCC Rcd 22430 (WTB 1996). These bidders, and those who dropped out in the course of the auction, had no reason to expect that the Commission would subsequently change the rules of the game. It is of course impossible to sort out how these bidders would have behaved differently if they could have foreseen the accommodations that would later be offered.

results, more confusion in the financial markets, and more delay in construction of facilities. A further cost is the long-term skepticism in the market that the Commission will revise its rules whenever the pressure is great enough.

It is my view that these rule changes prolong uncertainty, and fail to treat all interested parties equitably. Accordingly, to the extent the majority goes beyond the terms of last September's order, I respectfully dissent.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL POWELL, CONCURRING IN PART AND DISSENTING IN PART

Re: Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees (WT Docket No. 97-82)

On a fateful day in March of 1997, the Commission's Wireless Telecommunications Bureau -- at the urging of certain C-block auction winners and with all good intentions -- suspended installment payments for C-block licensees. This action set forth in motion, in my observation, a calamity of sorts that now culminates in yet another round (hopefully the last) of "March Madness." We are asked to reconsider the prior Commission's decision from last September which offered measured relief to the successful C-block auction participants, primarily out of some concern that licenses might get tied up in bankruptcy court should many of these companies default. I support that prior decision and its rationale.

As I explain more fully below, I also endorse our decision to keep the basic framework established in our prior order and to reject proposals to radically change the rules of the game. Though I support most of the modest measures we take here, I believe that more substantial modifications to help a small subset of C-block companies that find themselves unable to meet the original terms and conditions of the auction would do more harm than good. Specifically, I believe that to do so would severely compromise the prospects for both existing and future small businesses and other designated entities to raise sufficient capital to complete effectively in the

marketplace.

The C-block was established out of a recognition that small businesses and entrepreneurs, including minorities and women, faced particularly difficult challenges in raising sufficient capital to compete at auction for spectrum and for financing their eventual build-outs. The rules were designed to ensure a fair opportunity to obtain spectrum (by segregating a block and holding it out exclusively for these interests) and to provide more lenient, below-market payment terms to ease the burden of raising capital to bid for spectrum and to finance build-out. In hindsight, one might question the financing terms in light of their unintended consequences, but they were nonetheless the rules of the game established for all to abide by.

Rules, by their very nature, will always be both over-inclusive and under- inclusive. That is, they benefit some they really should not, and they will disadvantage others that should benefit. The virtue of any rule, however, is that it provides a degree of certainty and clarity. Rules should allow all players to understand the terms and conditions of the contest and to reliably predict the results of complying or failing to comply with them. In the context of an auction, relying on the established rules allows participants to evaluate the consequences of their bids -- bid too high and fail to make a payment and you will forfeit your (or your investors') money and lose your license, bid to low and you risk losing the opportunity to hold a lucrative license. In the C-block auction, all participants made these difficult decisions all along the way -- some dropped out, some stayed in. The risk assessments and decisions that each participant made were anchored in the terms and conditions of the auction as well as their vision of the future market. As long as the rules were

clearly established, the participants could make their own judgments about their risk tolerance, then knowingly face the consequences of their judgments and be held responsible in the event of market failures.

When the referee (in this case, the Commission) starts tinkering with the rules during the game, or worse after the buzzer has sounded, it does two very unfortunate things: First, it undermines the fairness of the contest. This we know from the earliest age and the principle is echoed on ball fields and gymnasium floors, in olympic arenas, during board games, and even in politics. The cardinal principle is that whether the rule is good or bad it must apply equally to all players or the game is patently arbitrary and unfair and the outcome invalid. There assuredly are always those that support the referee's intervention, because the resulting changes put them on top, or keep them in the lead. However, there are others that sit back in the locker room stunned and dismayed that the rules, advertised as conditions for victory, were changed to accommodate certain players. Second, and most importantly in my mind, is that by telegraphing to the world that the game is subject to unpredictable changes in the rules based on the subjective decisions of the tournament organizers, you discourage people from playing the game at all.

If we constantly adjust our rules to "help" certain players, no matter how sympathetic their plight, we run the very severe risk of foreclosing future opportunities for this very class of players to enter, and compete effectively, in future games. Most telecommunications contests require money to enter and more money to win. It is difficult enough for small, often unproven, companies to raise funds because of the risk associated with their ventures. The Commission should not,

by waxing and waning on the regulatory structure, make it more difficult by adding to the uncertainty. If we demonstrate that we are an unreliable referee, capital markets will be unwilling to take the additional risks associated with the regulatory uncertainty that befalls a process by which the rules can be altered at any time based on the sympathies that happen to win the day.

There are acute risks associated with the type of ventures C-block was designed to help, over which regulators have no control, but which are key risk factors for potential investors. This heightens my fear of tipping the risk scale against these companies. It should be remembered that to investors, the entities now seeking our help are inherently risky ventures to begin with. Often their management is less proven, their business plans are untested and less complete, and their optimism is sometimes overstated. This is before consideration of the stiff competition such entities will face in the marketplace if they do win a license in an auction. The additional risk we introduce by demonstrating that our rules are not truly reliable may be more than investors can bear. I sincerely question whether the events of the past and even the little bit we offer to parties in financial distress today is worth the further damage we may do to the risk calculations of investors tomorrow. The sad result being that the very class of people we hope to help now will be left short later.

This Order provides a number of measures I fully support, for they should provide each C-block licensee slightly more flexibility and, consequently, a fighting chance to attract financing, build-out and compete. Most of them clean up imperfections in the original order without doing damage to the underlying principles. In particular, with the added flexibility of the MTA- by-MTA choice of options, we have

taken away the artificial and unnecessary nationalization of the C-block "relief" plan. Instead, business plans and investment pitches can continue despite the circumstances facing these licensees. I must depart from the majority on one point, however: allowing participants to use certain down-payment "credits" and continue paying installments.

Separate Statement of Commissioner Gloria Tristani

In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses

Order on Reconsideration of the *Second Report and Order*

I am heartened that the Commission has agreed to a package of fair, reasonable, and commercially viable options addressing the financial issues confronted by C block licensees. And I am hopeful that the majority of licensees will find among these options the flexibility to pursue their business plans as they best see fit. I am satisfied that the Commission has done virtually all that it can to provide C block licensees flexibility and relief consistent with and required by our overriding mandate to manage the spectrum in the public interest, and so I join the majority's decision. I write separately, however, to articulate the fundamental principles guiding my decision. Those principles would have led me to support greater relief in the treatment of the down payment credit.

In granting the Commission authority to assign spectrum licenses by auction, Congress directed us to use that authority for the ends of promoting the development and rapid deployment of new technologies and services for the public, facilitating economic opportunity for designated entities and new entrants, and vigorously fostering competition. I take these directives as the lodestar of my decision.

Much has been written about the need to protect the integrity and fundamental fairness of our auctions. With this,

I fully agree. But I also believe that when the Commission acted last September, it was generally acknowledged that a significant number of C block licensees, holding licenses covering a majority of the United States, were in financial distress. The financial difficulties of several of the largest licensees cast shadows of doubt across many of the smaller licensees because of the largely interdependent nature of the licenses as building blocks for a nationwide network.

Recognizing the severity of the problem, and its responsibility to assure that this spectrum is used in the public interest, the Commission appropriately decided last year to modify its rules to provide licensees with modest, but tangible, relief. By offering relief through a public notice and comment rulemaking, we have been able to uniformly address the rights of a class of licensees without undermining the integrity of our auctions program.

Some commenters and licensees would have us go further -- to discount and restructure their debt, much as an ordinary commercial lender might. Yet the Commission is not a commercial lender, and we are confronted by competing policies as we negotiate a path as both lender and regulator. In our role as spectrum manager, it is not appropriate for the Commission to assure the success of any class of licensees. C block is an entrepreneurs' block. The truth is that entrepreneurs and small businesses do fail. And they fail at a rate greater than other businesses overall. So it would be inadvisable for the Commission to tie its spectrum management policy to the assured success of any group of licensees; to seek to avoid bankruptcies at all costs; or to become an apologist when such bankruptcies do occur. Fairness to all auctions participants requires that we not adopt measures that would significantly alter the financial

obligations that the successful bidders themselves freely assumed at auction. But we can, and should, give them the opportunity to survive and thrive.

Today's decision provides that opportunity by granting licensees significant flexibility to modify their holdings in light of market conditions and business plans. We have upheld the Commission's original decision to provide a variety of options, recognizing that no single option would be appropriate for all. The character of the relief offered is to allow licensees to surrender a certain amount of spectrum in exchange for a proportionate reduction in debt. In addition, we offer further flexibility, so that licensees may adopt different options in different regions (on a MTA basis), as well as combine prepayment and disaggregation.

Inherent in this approach is a focus on whether the licensee chooses to use or relinquish the spectrum it currently holds. Having decided to grant licensees this relief through flexibility, I believe that the use or non-use of the spectrum should remain the central point in structuring the relief options. Such a view is constructive and forward-looking, rather than focusing on whether certain licensees willfully overbid, or inadvertently overbid, or whether they overbid at all. Such past actions of any individual licensees become irrelevant, I believe, in light of our affirmation of the Commission's decision to offer comprehensive relief and flexibility to all licensees.

Centering on whether a licensee intends to use its spectrum to provide service to the public, or whether it plans to return it, my approach would lead to a different treatment of the licensee's 10% down payment on deposit with the Commission. I do not disagree that it is appropriate for some

small fee or cost to be associated with the abandonment of spectrum previously bid for, whether surrendered in a 30 MHz or 15 MHz portion. I join the majority's view that 3% of the net bid (equal to 30% of the down payment), which it adopted for most of the options, is appropriate. However, I view this cost as akin to fee for restructuring, much as a commercial bank might impose. It acknowledges the cost of the restructuring, and is in exchange for the benefits of relief from a substantial portion of debt and the creation of an automatic spectrum market (in the case of disaggregation), or the opportunity to hold an unencumbered license (in the case of prepayment). But 3% of the net bid, or 30% of the down payment, also is minimal enough not to act as a disincentive or a penalty for a licensee making a choice which the Commission has otherwise freely offered. I would not view this cost as a "deterrent to speculative bidding," which is a redressed description of a penalty for past behavior.

This cost should be associated only with the abandonment of the spectrum. The licensee would forfeit 30% of the down payment that relates to the spectrum it chooses to return, whether as a whole 30 MHz license (under the pure prepayment option) or 15 MHz piece (under either disaggregation option). Correspondingly, the licensee would retain 100% of the down payment that relates to the spectrum it chooses to keep. Critically, licensees are not penalized to the extent that they choose to go forward with providing service to the public. This approach -- focusing on the use of the spectrum -- is consistent with our spectrum management responsibilities, as expressed in Section 309(j), to promote service to the public, provide opportunity for new entrants, and foster competition.

Basing the fee on the amount of spectrum returned results in

varying credits of the down payment. Licensees would receive a 70% credit for a full license returned under the prepayment option, while receiving 85% credit for a license disaggregated, whether then prepaid or continued on installment payments. Some suggest that the lack of parallel treatment is a problem -- that each license should be subject to the same fee, whatever option is chosen. But the size or design of a license is itself arbitrary, as acknowledged by the fact that the Commission has either adopted or proposed spectrum partitioning and disaggregation rules for the majority of commercial mobile radio services. A cost per license would be a cost merely to participate in the choices we offer. That analysis is more characteristic of a bank, less a manager of the spectrum.

Likewise, today's Order suggests that we should provide greater incentives for licensees to select the prepayment option, because it has the effect of removing the Commission from the banking business. I believe this analysis has two flaws. First, any modification to the credit of the 10% down payment will affect a licensee's choice of prepayment marginally, if at all. A decision to prepay will be made on the overall economic costs and benefits to the licensee. Although prepayment may be a good option for some -- particularly those able to obtain down payment credits for the surrender of other licenses -- for others it will not, because it does not account for loss of government financing substantially below their cost of funds in the private market. Because the installment payment plan was offered at the government's cost of funds, a prepayment option discounted to the licensee's higher cost of funds would not be economically neutral to the government. For that reason, and because such a discount would fundamentally change the terms under which these bidders won (and others lost) these licenses, I

agree with the decision not to discount the debt. Nonetheless, I believe we must recognize that such a decision affects the overall economic attractiveness of prepayment. A modest tinkering with the credit of the down payment to lessen the credit for disaggregation with resumption of payments, and to increase the credit for disaggregation with prepayment, will not affect that balance.

In addition, for C block the decision for the Commission to serve as a banker is over. That decision was complete with the adoption of service rules. Whether prepayment is a good option for some, we will the remain banker for many. Though I agreed with our decision in the recent Part 1 Report and Order to temporarily suspend the use of installment payments in future rulemaking proceedings, I do not believe we should distinguish the cost of an option based upon whether it minimally reduces our banking role for this service.

Thus, I would offer an 85% credit for any licensee choosing the disaggregation option, whether prepaying or continuing on installment payments. I would not tinker with the calculation of the down payment credit, merely to make disaggregation with installment payments cosmetically equal to standard prepayment, or to make disaggregation with prepayment more attractive than disaggregation with installment payments. It is easier -- and more in the public interest -- simply to ask whether the licensee is choosing to serve the public by making use of the spectrum. Despite these decisional differences, I am pleased that the majority is able to support use of 85% of the down payment for at least one of the disaggregation options.

There is an additional area where I believe we provide

important and useful flexibility. This is the modification to allow licensees to apply to the down payment credit either to reduce principal or to apply against accumulated suspension interest. Suspension interest is, in effect, a past debt. It has accumulated because the Commission, by Bureau Order, suspended payments pending resolution of this proceeding. Allowing application of the credits to suspension interest will provide licensees modest relief from the burden of paying both past and current interest simultaneously. At the same time, we do not defer current debt. To take advantage of this option, licensees must be timely on all current interest, making a showing of financial viability.

Federal Communications Commission FCC 98-290

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Request for Extension of the	)	WT Docket No. 97-82
Commission's Initial Non-	)	
Delinquency Period for C and F	)	
Block Installment Payments	)	

ORDER

Adopted: October 29, 1998 Released: October 29, 1998

By the Commission: Commissioner Kennard issuing a statement. Commissioners Furchtgott-Roth and Tristani dissenting in part and issuing a joint statement.

1. On July 31, 1998, broadband PCS C and F block licensees were required to resume making installment payments on their licenses.[1] However, in accordance with the *Order on Reconsideration of the Second Report and Order* ("*Reconsideration Order*"),[2] licensees that failed to meet the

[1] "Wireless Telecommunications Bureau Announces 1998 Election Date for Broadband PCS C Block Licensees; Payments for C and F Block Licensees Resume July 31, 1998," *Public Notice*, DA 98-741 (released April 17, 1998).

[2] Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998).

July 31, 1998, deadline may submit their payment on or before October 29, 1998, without being considered delinquent, if they pay a 5 percent late payment fee. Several licensees have filed requests seeking a waiver of the October 29, 1998, deadline for late payments. For the reasons stated below, we deny these requests.

2. Airadigm Communications, Inc. ("Airadigm") asks the Commission to suspend its installment payment for 12 months.[3] Airadigm claims that, without a waiver of the Commission's rules, its inability to fulfill both its obligation to the Commission and its obligation to its principal creditor will threaten the provision of service to its customers and the expansion of its system.[4] Urban Comm-North Carolina, Inc. ("Urban Comm") argues that, due to the collapse of financial markets after the issuance of the *Reconsideration Order*, the Commission should extend the non-delinquency period another 180 days.[5] In addition, 21st Century Telesis Joint Venture and its wholly-owned subsidiary, 21st Century Bidding Corp. (collectively, "21st Century") seek an extension until January 31, 1999, for the resumption of their

[3] Airadigm Request for Rule Waiver at 3 (seeking a partial waiver of 47 C.F.R. § 24.711(b) and a waiver of § 1.2110(f)(4)). In light of our denial of Airadigm's request, and as requested by Airadigm, we will return Airadigm's supplemental pleading containing privileged and confidential information.

[4] *Id.* at 2.

[5] Urban-Comm Petition for Extension of Interest Payment Date at 2 (although Urban-Comm appears to be seeking an extension on behalf of all C block licensees, we will treat Urban-Comm's petition as an individual waiver request because the time period for making global requests has expired).

installment and accrued interest payment obligations.[6] 21st Century asserts that it needs more time to finalize negotiations for capital placement in light of recently discovered problems with its original capitalization plan.[7] SouthEast Telephone, Inc. ("SouthEast Telephone") requests relief through December 31, 1998, in order to allow it time to receive anticipated funding.[8] Funding delays also caused Wireless Ventures, Inc. to seek an extension until December 13, 1998, or whatever time period the Commission provides to other C block licensees that also are seeking waivers.[9] Finally, Personal Communications Network, Inc. ("PCN") asks for a two-week grace period to accommodate last-minute delays with a needed stock subscription.[10]

3. We decline to waive the October 29, 1998, late payment deadline in response to the individual situations presented. In order for a waiver of the PCS rules to be granted, one of two tests must be met. The entity requesting a waiver must demonstrate either that: (1) "the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest" or (2) "the unique facts and

---

[6] 21st Century Emergency Petition at 3 (seeking a waiver of 47 C.F.R. § 1.2110(f)(4)(iii)). We note that 21st Century's request is rendered moot because it submitted its payment on October 28, 1998.

[7] *Id.* at 4.

[8] SouthEast Telephone Emergency Request at 1, 6 (seeking a waiver of 47 C.F.R. § 1.2110(f)(4)(iii)).

[9] Wireless Ventures, Inc. Emergency Request for Waiver at 2 (seeking a waiver of the automatic cancellation provisions of 47 C.F.R. § 1.2110(f)).

[10] PCN Request for Grace Period and Waiver of Rule 1.2110(f)(4)(iii) & (iv) at 1.

circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest."[11]

4. Although the specific concerns raised by each petitioner vary, all revolve around the same theme -- the inability to raise capital. The challenge of raising capital to finance C and F block licenses exists in varying degrees for all licensees and does not constitute "unique facts and circumstances." In formulating, as well as reconsidering, the restructuring options, the Commission addressed the challenges of raising capital. Further, we do not believe that the underlying purpose of our rules would be frustrated by their application here or that it would serve the public interest to delay their enforcement. As we stated in the *Reconsideration Order*, "[n]o matter what deadline we establish, it is inevitable that some licensees will seek more time to pay."[12]

5. Although we are sympathetic to the difficulties certain licensees are facing in securing capital, the Commission made it clear that it "will not entertain any requests for an extension" beyond the 60-day non-delinquency period that originally was established for initial payments not submitted by the payment resumption date for C and F block licensees.[13]

---

[11] *See* 47 C.F.R. § 24.819.

[12] *Reconsideration Order*, 13 FCC Rcd at 8354 para. 24.

[13] Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436, 16,451 para. 30 (1997). *See also* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 441

Further, we ratified a firm deadline for late payments in the *Reconsideration Order*.[14] Despite the fact that our rules, as amended effective March 16, 1996, allow an automatic grace period for installment payments not made within a non-delinquency period,[15] we determined that such a grace period is not appropriate for the initial July 31 payment.[16] First, licensees have already enjoyed a payment suspension since the spring of 1997.[17] Second, in the *Reconsideration Order*, we provided additional relief by extending to 90 days the original 60-day non-delinquency period for initial payments. A further extension of the non-delinquency period would only serve to undermine the Commission's enforcement of its payment deadlines. Therefore, licensees that failed to make payment by July 31, 1998, and fail to make full payment by October 29, 1998, including the 5 percent late payment fee, will be subject to the automatic cancellation of their licenses.[18]

---

para. 112 (1997) (reiterating that extension requests will not be entertained).

[14] *Reconsideration Order*, 13 FCC Rcd at 8355 para. 26.

[15] *See* 47 C.F.R. § 1.2110(f)(4)(ii).

[16] *Reconsideration Order*, 13 FCC Rcd at 8355 para. 26.

[17] Installment payments were suspended for C block licensees on March 31, 1997, and for F block licensees on April 28, 1997. *See* Installment Payments for PCS Licenses, *Order*, 12 FCC Rcd 17,325 (WTB 1997); "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," *Public Notice*, DA 97-883 (released April 28, 1997) at 2.

[18] *See* "Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules," *Public Notice*, DA 98-1897 (released September 18, 1998). We note that on October 28, 1998, the D.C. Circuit denied an emergency motion filed by SouthEast Telephone seeking a stay of the license cancellation deadline. *SouthEast Telephone, Inc. v. FCC*, No. 98-1491 (Order of October 28, 1998).

6. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the requests filed by Airadigm Communications, Inc., Urban Comm-North Carolina, Inc., SouthEast Telephone, Inc., Wireless Ventures, Inc., and Personal Communications Network, Inc. for a waiver of the October 29, 1998, late payment deadline for C and F block licensees are DENIED and the waiver request filed by 21st Century Telesis Joint Venture and 21st Century Bidding Corp. is DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

SEPARATE STATEMENT OF CHAIRMAN WILLIAM KENNARD ON C BLOCK RESUMPTION OF PAYMENT WAIVER DENIALS

I am sympathetic to the communities being served by the six PCS providers that have requested a waiver of the October 29 deadline for late payment for C block licenses. I am especially moved by the desire of some of these providers to serve previously underserved communities, including areas inside Native American reservations. However, the Commission has done the right thing by denying these requests. We have stated unequivocally that we would not entertain any extensions of this payment deadline. When these companies won licenses in the Commission's C block auction they knew they would eventually have to pay what they bid. These companies have not had to make any payments for their licenses since March of 1997 -- over a year and a half ago. The time to fulfill the commitments they made to the U.S. Treasury is now.

The bottom line is we need to have an even playing field. There are many small businesses that made their payments on the original payment date of July 31, and we anticipate many more making their payments today. It is simply not fair to give these six companies special treatment.

We have said from the beginning of the auction program that the Commission's job is to create opportunities, not to guarantee successes. We have done our job. Now it is up to these companies to develop successful businesses.

Statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani, Dissenting in Part

In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments

By its actions today, the Commission majority disregards licensees who are fulfilling the Commission's Section 309(j)[1] mandate that the spectrum be used to deliver service to the public, including those residing in underserved rural areas.

This Order issues a blanket denial of six requests for waiver of the October 29, 1998, late payment date for C and F Block licensees. The majority finds that the concerns raised by each petitioner "all revolve around the same theme -- the inability to raise capital." It then concludes: "The challenge of raising capital to finance C and F block licenses exists in varying degrees for all licensees and does not constitute 'unique facts and circumstances.'" On this depth of analysis, the majority denies all of the requests. We respectfully dissent in part from this decision because we believe that two of the requests satisfy the Commission's standard for granting a waiver.

Our rules provide that the Commission may grant waiver requests if "the underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest," or if "the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome, or otherwise contrary to the public

---

[1] 47 U.S.C. § 309(j).

interest."[2] As this standard refers to a rule's "application in a particular case," as well as to the "unique facts and circumstances of a particular case," we believe that these requests warrant a hard look and due consideration of the specific facts presented in the pleadings.

The majority is correct that, in establishing the payment resumption date in the C Block *Reconsideration Order*,[3] we departed from our standard payment rules governing all services. That date was subsequently set for July 31, 1998, with a one time non-delinquency period of 90 days (with a 5% late fee). Hence, in order to avoid default and automatic license cancellation, those payments are due today, October 29, 1998. In contrast, our standard payment rules provide for a 90-day non-delinquency period, followed by a 90-day grace period, each with corresponding late fee.[4] In the *C Block Reconsideration Order*, we declined to apply those provisions for the initial resumption of payments on the premise that the licensees already had received a year of suspension of payments. However, the decision not to apply a 90-day grace period across the board for all C block licensees does not -- and should not -- mean that we summarily reject a request for a limited extension of the payment obligation upon an individualized showing that such action would be in the public interest.

---

[2] 47 C.F.R. § 24.819 (1997).

[3] Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998) ("*C Block Reconsideration Order*").

[4] 47 C.F.R. § 1.2110(f)(4)(i),(ii).

In this regard, we find the majority's disposition of two of today's waiver requests to be particularly disconcerting. Airadigm Communications, Inc., holds 13 C Block licenses in largely rural Wisconsin and was the first non- pioneer's preference licensee to begin offering service. It has invested over $100 million in its markets, has built-out its facilities to cover one million people (over 1/3 of its licensed population), and currently has over 7,000 subscribers. Many of these subscribers live on the Oneida Indian Reservation, an area which never before had received wireless coverage. Airadigm also provides service for the tribe's public safety operations, so that the tribe's police force, for the first time, has mobile telecommunications. Airadigm consistently has complied with our rules, successfully making both first and second downpayments, as well as being one of the few C Block licensees submitting a first installment payment after the Commission suspended payments on March 31, 1997. These past payments to the Commission total more than $8 million. Airadigm now requests a six-month deferral of its $2.3 million second installment payment, pending a cash infusion from a sale and lease-back of it's towers, as well as a second round of private financing.

SouthEast Telephone, Inc., holds 6 C Block licenses in rural Kentucky. SouthEast initiated service on October 1. It plans to offer both mobile and local loop service to an area with telephone penetration of only 80-90%, well below the national average. SouthEast's present construction covers 15% of their licensed population, and it is constructing sites to double its total within the next month. After substantial delay on a pro forma transfer which was approved by the Commission in January of this year, SouthEast successfully obtained financing which has allowed it to contract for its remaining buildout. SouthEast also successfully made its

first and second down payments. It now seeks a two-month deferral of approximately $400,000, pending a cash infusion from private investors based on service milestones, as well as a sale and lease-back of its towers, both of which are expected to occur in the next 60 days.

We believe that the facts of these particular cases meet at least the second prong of the waiver standard, and that strict application of the payment deadline and the default and automatic cancellation rules here would be "inequitable, unduly burdensome, or otherwise contrary to the public interest." Section 309(j) mandates that we protect the public interest in the use of the spectrum and promote several goals. Among them are two critical goals implicated here: (1) "the development and rapid deployment of new technologies, products and services for the benefit of the public, including those residing in rural areas," and (2) "recovery for the public of a portion of value of the public spectrum resource."[5] We believe that these goals require balancing, that neither is to take absolute precedence over the other, and that granting a temporary waiver in these cases ultimately would best serve both objectives.

Here we have two licensees providing valuable service to previously unserved, or underserved, areas. Both are experiencing temporary financial difficulty, and have asked for a brief window of time to remedy their shortfall. Both have essentially demonstrated their broader viability and their commitment to providing service to the public. Both have a prior history of successful compliance with our payment deadlines. Both have provided significant detail regarding

[5] 47 U.S.C. § 309(j)(3)(A),(C).

their current finances, their private creditor arrangements, and their sources of expected capital which would allow them meet their obligation after a short deferral. And both have requested extensions for limited periods of time (2 months and 6 months), tailored to their expected infusions of capital.

In the past, the Commission has recognized the occasional need for flexibility in our installment payment program. Indeed, that is why our standard rules provide for automatic non-delinquency and grace periods totalling 180 days. We have consistently distinguished between the upfront and down payments, on the one hand, and installment payments, on the other. Timely down payments, we have found, are a critical indicator of a licensee's financial health and ability to construct its system and, ultimately, to provide service to the public. Thus, we have granted waivers of the down payment rules only in extremely limited circumstances. But with installment payments, we have recognized the fluctuations inherent in business cycles and the occasional need for flexibility. The fact that these extensions are provided automatically, by rule, rather than by individual showing of exigent circumstances, only underscores this point. Where a licensee has demonstrated its viability through its down payments and has substantially built-out its system, some limited form of flexibility upon a showing of unique facts and circumstances is all the more warranted.

It may be said that these licensees simply have chosen to pay other creditors before the FCC, and that we should not countenance such a result. As the Commission has noted in previous decisions on the C and F Block installment payment program, we find ourselves in the difficult position of being both regulator and lender to our licensees. If, in our latter role, we had the freedom to behave as commercial lenders,

we could use many tools to restructure the loans of debtors in financial straits. We could raise interest rates or secure additional collateral, for example. The Commission has very little latitude, however, to work with its debtors. Indeed, the only flexibility we have is to grant extensions of payment deadlines. We must not let a fear of "opening the floodgates" deter us from applying judgment to individual cases. Nor must we become so unyielding in our financial role that we undermine our paramount charge of ensuring that the spectrum is used in the public interest.

Finally, these licensees may actually survive -- that is, make their installment payment and keep their licenses by risking their future financing and future stability -- without an extension of the payment deadline. We would be willing to take this "risk" of misjudging the licensees' ability to pay because we believe there is far greater risk for the Commission to deny the extension and watch a successful C Block licensee lose its license and a community of Americans once again become unserved.

Federal Communications Commission **FCC 99-62**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
	)
Request for Extension of the	) WT Docket No. 97-82
Commission's Initial Non-	)
Delinquency Period for C and F	)
Block Installment Payments	)

Adopted: March 25, 1999 Released: April 2, 1999

By the Commission: Commissioners Furchtgott-Roth and Tristani dissenting and issuing a joint statement.

1. We have before us petitions for reconsideration ("Petitions") filed by SouthEast Telephone, Inc. ("SouthEast") and Wireless Ventures, Inc. ("Wireless Ventures") (collectively "Petitioners"). They seek review of the Commission's order, released October 29, 1998, denying requests for waiver of the October 29, 1998, deadline for late resumption of installment payments filed by several broadband PCS C and F block licensees, including Petitioners.[1] Additionally, SouthEast filed an Emergency

[1] See In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, WT Docket No. 97-82, *Order*, FCC 98-290 (released October 29, 1998) ("*October 29th Order*"). On November 30, 1998, Wireless Ventures submitted a filing styled an application for review of a Bureau order, rather than a petition for reconsideration of the Commission's *October 29th Order*, as procedure mandates. For the purpose of this order, we will treat Wireless

Request for Stay ("Emergency Request") of the *October 29th Order*[2] and a Request for Stay of the auction of the licenses formerly held by SouthEast.[3] On November 20, 1998, by Public Notice, we requested comment on SouthEast's Petition.[4] We received two comments in support of the Petition.[5] For the reasons stated below, we deny the Petitions and SouthEast's Emergency Request.

2. *Petitions.* SouthEast contends that the Commission did not address the specific facts and circumstances that supported SouthEast's request for waiver under the "hard look" standard set forth in *WAIT Radio v. FCC*.[6] Commenters AirNet and DiGiPH support this argument.[7] Wireless Ventures argues that the Commission erred in holding that

---

Ventures' Application for Review as a petition for reconsideration.

[2] SouthEast filed both its Petition and Emergency Request on November 4, 1998. SouthEast also submitted a Supplement to Petition for Reconsideration on November 30, 1998, a Second Supplement to Petition for Reconsideration on December 4, 1998 ("Second Supplement"), and a Third Supplement to Petition for Reconsideration on February 25, 1999 ("Third Supplement"). Pursuant to Section 1.106(f) of the Commission's rules, SouthEast's Second Supplement and Third Supplement are untimely. Nevertheless, we will address the issues they raise.

[3] SouthEast filed a Request for Stay Or, In the Alternative, For Withdrawal of Markets From Relicensing Process on March 11, 1999 ("Request for Stay").

[4] "Wireless Telecommunications Bureau Seeks Comment of Petition for Reconsideration," Public Notice, DA 98-2343 (released November 20, 1998).

[5] See Comments of AirNet Communications Corporation ("AirNet"), filed November 30, 1998, and Comments of DiGiPh PCS, Inc. ("DiGiPh"), filed November 30, 1998.

[6] 418 F.2d 1153 (D.C. Cir. 1969) ("*WAIT*").

[7] Comments of DiGiPH at 2; Comments of AirNet at 2.

the public interest would not be harmed by denying its request for waiver.[8]

3. We disagree with Petitioners' contentions. At the outset, we note that the court in WAIT stated that because the "very essence of waiver is the assumed validity of the general rule; . . . an applicant for waiver faces a high hurdle even at the starting gate."[9] The Commission has repeatedly given a hard look to the facts supporting these requests for waiver. Indeed, before issuing the *October 29th Order*, the Commission looked carefully at the facts of each individual waiver request, including SouthEast's,[10] as well as additional facts submitted by SouthEast.[11] SouthEast has not provided any new facts to convince us that our previous decision was wrong.

4. The Commission's decision in the *October 29th Order* was clearly contemplated by the *C Block Second Report and Order, the C Block Order on Reconsideration of the Second Report and Order* and the *Election and Payment Date Order*, in which the Commission carefully considered all aspects of the installment payment issues raised by Petitioners and provided restructuring options and a lengthy suspension of

---

[8] See Wireless Ventures' Petition for Reconsideration at 3.

[9] 418 F.2d at 1157. See *BellSouth Corporation and BellSouth Wireless, Inc. v. FCC*, No. 97-1630 (D.C. Cir. January 8, 1999) (upholding Commission denial of a waiver request).

[10] See Emergency Request for Temporary Waiver or Suspension of the Automatic Cancellation Provision of Section 1.2110(f)(4)(iii) of the Commission's Rules, dated October 26, 1998.

[11] See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Jay N. Lazrus, Myers Keller Communications Law Group, dated October 28, 1998.

installment payments.[12] In the *C Block Second Report and Order*, the Commission informed the public that it was unlikely to grant waivers of the payment resumption deadlines in light of public interest considerations, particularly as the Commission had already afforded licensees a significant period to raise capital during the time that installment payments were suspended.[13] We observed in the *October 29th Order* that "[i]n formulating, as well as reconsidering, the restructuring options, the Commission addressed the challenges of raising capital."[14] Acknowledging that access to capital remains an important issue for most C block licensees, including Petitioners, the Commission nonetheless concluded that "a further extension of the non-delinquency period would only serve to undermine the Commission's enforcement of its payment deadlines."[15] Petitioners' requests for waiver were denied not because the Commission failed to give them the hard look they warranted, but rather because the Commission does not agree with

---

[12] See Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order*, FCC 97-342, 12 FCC Rcd 16436 (1997) ("*C Block Second Report and Order*"); Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order*, FCC 98-28 (released February 24, 1998) at ¶ 2 ("*Election and Payment Date Order*"); Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998) ("*C Block Order on Reconsideration of the Second Report and Order*").

[13] 12 FCC Rcd at 16541.

[14] *October 29th Order* at ¶ 4.

[15] *October 29th Order* at ¶ 5.

Petitioners that further extension of the payment deadline would serve the public interest.

5. Furthermore, we disagree with SouthEast's argument that the Commission's payment rules are unclear and do not necessarily result in the automatic cancellation of licenses for a late installment payment.[16] At the time that SouthEast purchased its licenses, the payment rules provided that a license would cancel following the expiration of any grace period without the successful resumption of payment or upon default with no grace period.[17] The *C Block Order on Reconsideration of the Second Report and Order* amended the rules to provide that a payment made "more than ninety (90) days" after the resumption payment due date would be deemed a default on the part of the C or F block licensee.[18] In a Public Notice, released April 17, 1998, the Wireless Telecommunications Bureau ("Bureau") stated that licensees that failed to meet the July 31, 1998, payment resumption deadline could submit their payment on or before October 29, 1998, without being considered delinquent, if they timely pay a five percent late payment fee.[19] Most recently, the Bureau reiterated this policy in a Public Notice, dated September 18, 1998, in which it stated that licensees that miss the late payment deadline shall be in default and their licenses shall

---

[16] SouthEast Petition at p 13.

[17] 47 C.F.R. § 1.2110(e)(4)(iii) (1996).

[18] *C Block Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd at 8354.

[19] See "Wireless Telecommunications Bureau Announces June 8, 1998 Election Date for Broadband PCS C Block Licensees," *Public Notice*, DA 98-741 (released April 17, 1998). See also 47 C.F.R. § 1.2110(f)(4)(iii).

automatically cancel.[20] Contrary to its contentions, SouthEast was well aware that its licenses would cancel automatically if it failed to make full payment of amounts due on October 29, 1998, and cannot claim that the rules do not operate as a matter of law to effectuate automatic cancellation.

6. In denying Petitioners' requests, we reject SouthEast's argument that grant of its waiver request would be consistent with the TE-MCG decision,[21] in which the Bureau granted Specialized Mobile Radio (SMR) licensee TE- MCG's request for waiver of 47 C.F.R. § 90.812, which governs installment payments for 900 MHz SMR licensees.[22] In that case, as a result of an administrative oversight, the Bureau accepted late payment of several installments and timely payment of subsequent installments from TE-MCG, constructively waiving the deadlines for the late regularly scheduled payments. In contrast, after clearly stating its intention not to extend the October 29, 1998 late payment deadline, the Commission expressly refused to grant Petitioners' waiver requests. Thus, unlike the TE-MCG case, the Commission has committed no act that could reasonably be construed as constructively waiving the applicable October 29, 1998, late payment deadline, obviating the need to grant a waiver in this instance. Therefore, we declined to grant SouthEast's waiver on the merits of its case, and the TE-MCG decision is inapposite.

7. Lastly, SouthEast contends that application of the

---

[20] See Public Notice, DA 98-1897 (released September 18, 1998).

[21] See Third Supplement.

[22] See Letter to Lloyd W. Coward, Esq., from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, DA 99-258 (released January 29, 1999).

Commission's rules on late installment payments and resumption payments[23] to SouthEast is retroactive rule making prohibited by the Administrative Procedure Act.[24] More specifically, SouthEast claims that the Commission's elimination of the provisions for grace period requests under former Section 1.2110(e)[25] impaired SouthEast's rights with respect to its previously established installment payment obligations. AirNet supports this contention.[26] In effect, SouthEast is requesting reconsideration of the *Part 1 Third Report and Order*, which was the Order in which the Commission eliminated the grace period provisions. This request is untimely[27]. Nevertheless, timely filed petitions for reconsideration of the *Part 1 Third Report and Order* raising this issue are pending before the Commission.[28]

8. *Requests for Stay.* SouthEast bases its Emergency Request and its Request for Stay on the four prong test for issuance of a stay set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*,[29] as modified in *Washington Metropolitan*

---

[23] 47 C.F.R. §§ 1.2110(f)(4)(iii) and 1.2110(f)(4)(iv) (1998).

[24] SouthEast Petition at pp 14-21; see 5 U.S.C. §§ 551 *et seq.*

[25] 47 C.F.R. § 1.2110(e)(4) (1997). See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 436-42, ¶¶ 106-113 ("*Part 1 Third Report and Order*").

[26] Comments of AirNet at 3.

[27] See 47 C.F.R. § 1.429(d).

[28] See 63 Fed. Reg. 9793 (1998).

[29] 259 F.2d 921 (D.C. Cir. 1958) ("*Virginia Petroleum*").

Area Transit Comm'n v. Holiday Tours, Inc.[30] Under this test, a stay is warranted if the movant can demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent a stay; (3) interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay. Upon examination of the Emergency Request and the Request for Stay, we find that SouthEast's arguments fail to meet the standards set forth in *Virginia Petroleum* and *Washington Metropolitan*.[31] SouthEast bases its contention that it meets the standards for issuance of a stay on the expectation that the Commission will grant its Petition. As discussed above, this is not the case. Therefore, SouthEast does not meet the test.

9. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Section 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the petitions for reconsideration submitted by SouthEast and Wireless Ventures ARE

---

[30] 559 F.2d 841 (D.C. Cir. 1977) ("*Washington Metropolitan*").

[31] On October 28, 1998, SouthEast filed an Emergency Petition for Stay of the payment resumption deadline in the U.S. Court of Appeals for the D.C. Circuit. The court denied the request on October 28, 1998. *See SouthEast Telephone, Inc. v. FCC*, No. 98-1491 (D.C. Cir. October 28, 1998). On October 29, 1998, SouthEast filed an ex parte request for a temporary restraining order ("TRO") in the U.S. District Court for the Eastern District of Kentucky, which the court granted, but rescinded on November 5, 1998. *See SouthEast Telephone, Inc. v. FCC*, No 98-465, Order dissolving TRO (E.D. Ky. Nov. 5, 1998). Subsequently, SouthEast filed an Emergency Petition to Stay Under the all Writs Act of the payment resumption deadline in the U.S. Court of Appeals for the D.C. Circuit, which the court denied on December 4, 1998. *See SouthEast Telephone, Inc. v. FCC*, No. 98-1555 (D.C. Cir. December 4, 1998). We note that SouthEast filed as its Second Supplement, copies of submissions made in connection with this last case in the D.C. Circuit.

DENIED as provided herein.

10. IT IS FURTHER ORDERED that SouthEast's Emergency Request IS DENIED.

11. IT IS FURTHER ORDERED that SouthEast's Request for Stay IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Dissenting Statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani

In the Matter of Request for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Payments

In today's action, the Commission fails to reconsider adequately an earlier decision which has the effect of cutting off communications service to underserved areas of rural Kentucky. For the reasons set forth below, we respectfully dissent from this decision.

In a 3-2 decision October 29, 1998, the Commission denied the request of C- Block licensee SouthEast Telephone, Inc., ("SouthEast") to grant a limited waiver of the deadline for resumption of installment payments. We dissented from the October 29th decision because we believed that the SouthEast situation met the criteria for waiver and that, at the very least, SouthEast's request warranted "a hard look and due consideration of the specific facts presented in the pleadings."

In its decision denying SouthEast's Petition for Reconsideration, the majority argues that denial of the waiver request was "clearly contemplated" by the original C-Block order. Although the Commission indicated that it would be reluctant to grant requests for extension, we cannot support the notion that a rule could fully anticipate and obviate all subsequent waiver requests. To do so would render the waiver process meaningless.

Moreover, the majority claims, but does not support the conclusion, that the Commission "looked carefully at the facts" of SouthEast's waiver request, as well as additional facts submitted by SouthEast before the October 29th

decision. We expressly disagreed with this assertion in our statement on the October 29th decision, and we continue to dispute the majority's claim that the Commission has given SouthEast the "hard look" required for waiver requests. The lack of analysis -- and even recitation -- of the facts of the case in both decisions belies the majority's assertion.[1] By merely repeating but not supporting its claims in the present decision, the majority disregards the purpose of the reconsideration process.

Finally, the majority states that "SouthEast has not provided any new facts to convince us that our previous decision is wrong." New facts, however, need not be provided by a petitioner, nor found by the Commission, as a prerequisite for the FCC to modify or reverse an earlier decision. Petitions need only "state with particularity the respects in which petitioner believes the action taken by the Commission or the designated authority should be changed [and] where appropriate, cite the findings of fact and/or conclusions of law which petitioner believes to be erroneous . . . ." 47 C.F.R. Sect. 1.106(d). Thus, even if we were to agree with the majority's analysis of the new facts presented by SouthEast, we believe the majority has failed to reconsider adequately its October 29th decision.

It is unfortunate that the Commission's zeal to enforce a self-created deadline has hampered its ability to fairly address petitions for waiver and reconsideration and has frustrated its

---

[1] For a discussion of these facts, see our previous statement. Dissenting Statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani, In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, WT Docket No. 97-82, *Order*, FCC98-290 (released October 29, 1998).

mandate from Congress to provide communications service to the public, including those in underserved rural areas. As for this particular situation, however, it is distressing that this same zeal will cut off communications service to underserved areas of rural Kentucky.

WILKIE FARR & GALLAGHER

March 13, 1997

Michele C. Farquhar, Esq.
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Washington, D.C. 20554

RE: Request For Modification Of Entrepreneurs' Block Installment Payment Obligations From A Quarterly To An Annual Payment Schedule

Dear Ms. Farquhar:

The undersigned Broadband C Block Personal Communications Service ("PSC") licensees ("Petitioners"),[1] by their counsel, hereby request a reformation of their Installment Payment Plan Notes and Security Agreements to modify existing installment payment obligations by moving from a quarterly to an annual payment schedule.[2] The public interest

---

[1] Petitioners include: Alpine PCS, Inc.; DCR PCS, Inc.; Eldorado Communications, L.L.C.; Indus., Inc.; KMTel L.L.C.; Mercury PCS, L.L.C.; Miccom Associates; NextWave Communications, Inc.; and R&S PCS, Inc.

[2] The requirement that C Block PCS licensees tender installment payments on a quarterly basis is not in the Commission's rules. Rather, it is created by the Note and Security Agreement signed by the Commission and each licensee. For this reason, no waiver of the Commission's rules is necessary to implement the instant request for C Block PCS licensees. Rather, pursuant to the Installment Payment Plan Note and the Security Agreement for C Block licensees, the Commission may reform the terms of the documents and licensees may consent by re-executing the documents.

benefits of the requested reformation by March 31, 1997, the date upon which interest payments fall due for numerous C block licensees, are detailed below.

Over the past several years, the Commission has pursued an aggressive spectrum assignment agenda – conducting 12 auctions to assign 3,651 FCC licenses, including over 2,000 new broadband PCS licenses. Consistent with its Section 309(j) obligations,[3] the Commission reserved a number of these licenses for small businesses and entrepreneurs.[4]

Since the Commission initially formulated competitive bidding rules for small businesses and entrepreneurs, the financial and regulatory climates in which such licensees operate have changed fundamentally. Some changes are positive, such as the Commission's willingness to revise its rules in order to remove unnecessary impediments to rapid facilities-based competition. Some changes are the direct result of the increasingly competitive marketplace. That is, all new entrants must construct their licenses quickly in order to

---

However, for the reasons stated herein, Petitioners believe that any reformed terms should be automatically incorporated into all other C and F block installment payment instruments.

[3] 47 U.S.C. §§ 309(j)(3)(B) and (4)(D).

[4] Small businesses have won nearly 50% of the licenses awarded through competitive bidding by the Commission. *See Statement of Reed E. Hundt, Chairman, Federal Communications Commission, on Spectrum Management Policy*, before the Subs. on Telecommunications, Trade, and Consumer Protection, Comm. on Commerce, U.S. House of Representatives (Feb. 12, 1997).

maintain their competitiveness.[5] This market-driven buildout acceleration greatly benefits consumers but places a strain on new entrants, whose challenge is further complicated by an increasingly cautions domestic investment climate.[6] In all, small businesses and entrepreneurs experience acutely the effects of these changed circumstances. For this reason, reformation of the debt instruments is entirely appropriate.

With the influx of new wireless competitors and the recent launch of new PCS network, financial investors are fully occupied *assessing* the financial effects o these new wireless services in a rapidly changing telecommunications environment. Given the inherent volatility and seasonal nature of the capital markets, modification of the installment plan to provide for annual payments will provide small businesses with greater flexibility to time their fund raising activities around favorable market conditions or when competition for funding is less congested. It also will give small businesses additional flexibility to take advantage of the benefits that are expected to arise out of the recent WTO Agreement.

---

[5] The Commission has reported wireless infrastructure investment in 1996 alone to be in excess of $26 billion. *See, e.g.*, Keynote Address of Michele C, Farquhar before the Telecommunications Reports, "Next Generation Wireless" Conference (Feb. 13, 1997)(Ms. Farquhar reporting that wireless investment, employment and subscribers *all* have increased by over 100% in 1996).

[6] The financial market have been inundated with competing requests for funding for telecommunications ventures. By the end of 1996, a record number of new telecommunications equity offerings had emerged. Concomitantly, investors increasingly scrutinize wireless carriers' ability to successfully adjust to the new era of wireless competition. *See, e.g.*, "A Meeting With Reed Hundt," *Bensche-marks*, vol. 97-04 (Feb. 24, 1997) (reporting that "the money pool for the C-Block was extremely tight").

The public interest benefits of reforming the installment payment plan instruments are significant. Most important, such changes will help ensure competition from new entrant small business and entrepreneur carriers. As the Commission intended when structuring installment payments, new wireless entrants are emerging from the entrepreneurs' blocks and are posied to provide an innovative range of price and service competition. Modifying the installment payment plan will fuel these efforts and further expand job creation in the wireless sector by permitting carriers to immediately concentrate their capital resources toward infrastructure buildout.

A greater immediate capital allocation toward auction payments necessarily diminishes the resources available for infrastructure development and job creation. The deferral and revision of entrepreneurs' block installment payment obligations, as proposed herein, would serve the public interest by permitting entrepreneurs' block licensees to focus on the establishment of the telecommunications infrastructure necessary to provide competitive wireless service. This would facilitate a quicker time-to-market for small business licensees, which would in turn allow them to start generating revenues from their deployed infrastructures at aa earlier time. In addition, it would help mitigate the time-to-market infrastructure deployment advantage that cellular incumbents and A and B Block licensees have enjoyed as an unintended result of the Commission's PCS auction schedule.

Moving from a quarterly to an annual payment schedule is a modest reformation of the Payment Plan Notes and Security Agreements. It conforms to the simple annual interest calculation on which existing payments are based, and it keeps the government whole in terms of the amount of funds collected from each licensee. Granting the request would not

reduce the amount of funds any licensee would pay. Under this proposal, the total mount of interest paid into the U.S. Treasury annually would remain unchanged from the amounts currently specified in the Commission's installment plan amortization schedules. The proposal merely defers for one year the date on which each licensee's next scheduled installment payment is due, with subsequent installments to be paid thereafter on an annual basis.

Reformation of the installment payment plan debt instruments is entirely consistent with Congress' directives and the Commission's actions governing small businesses. Both Congress and the Commission recognize the utility of federal efforts to enable small businesses to enter new markets and provide new services. In addition to Section 309(j), Congress recently passed federal legislation designed to address the needs of small businesses.[7] Among other things, the Small Business Fairness Act requires federal regulatory agencies to monitor and respond to the needs of small businesses. Similarly, Section 257 of the Communications Act[8] requires the Commission to identify and eliminate market entry barriers for small businesses. The Petitioners' proposal is entirely consistent with this legislation because it addresses directly the chief barrier recognized by the Commission: access to the capital markets.

The Commission, too, has begun to implement its statutory obligation to reduce market entry barriers for small businesses

---

[7] *See, e.g.*, Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Star. 847 (1996), *codified at* 5 U.S.C. § 601 *et seq.*; *see also* 47 U.S.C. § 257.

[8] 47 U.S.C. § 257.

through its *Notice of Inquiry*.[9] The Commission also recently recognized the promotional impact of installment payment programs for entrepreneurs and small businesses.[10] In recognition of the critical nature of installment payment schedules to the ultimate competitiveness of small businesses and entrepreneurs, the Commission sought comment on the appropriate schedule of installment payment terms for general application.[11] The Commission's experience with installment payment programs likely influences its contemplation of wholesale revision of its installment payment rules. However, the prospective nature of the Commission's proposed action renders the existing installment payment programs suboptional for existing licensees. This, in turn, counsels toward reformation of existing debt instrument arrangements for current licensees.

For these reasons, the Petitioners request expedited action in reforming their Installment Payment Plan Notes and Security Agreements with the Commission to modify existing installment payment obligations by moving from a quarterly to an annual payment schedule. We respectfully request that this action be taken before March 31, 1997, the date on which many

---

[9] *See, Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, GN Docket No. 96-113, *Notice of Inquiry*, FCC Rcd 6280 (1996).

[10] Amendment of Part I of the Commission's Rules – Competitive Bidding Proceeding, WT Docket No. 97-82, Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 97-60 at ¶ 32 (rel. Feb. 28, 1997) ("[I]nstallment payments have been utilized as a means of assisting small entities that are likely to have difficulty obtaining adequate private financing"); *see also id.* at ¶ 34 ("[W]e seek comment on ways that we could refine our installment payment plans to streamline without reducing benefits to small businesses").

[11] *Id.* at ¶ 36.

bidders must make their next quarterly interest payment.

Respectfully submitted,

/s/ Thomas Gutierrez
Thomas Gutierrez
David A. LaFuria
Lukas, McGowan, Nace & Gutierrez, Charterred
Suite 1200
1111 Nineteenth St., N.W.
Washington, D.C. 20036

Counsel for ALPINES PCS, INC., ELDORADO COMMUNICATIONS, KMTEL L.L.C. MERCURY PCS, L.L.C. MICCOM ASSOCIATES

/s/ William R. Richardson, Jr.
William R. Richardson, Jr.
Lynn R. Charytan
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037

Counsel for DCS PCS, INC.

/s/ Philip L. Verveer
Philip L. Verveer
Jennifer A. Donaldson
Wilkie Farr & Gallagher
1155 21st St., N.W.
Suite 600
Washington, D.C. 20036

Counsel for INDUS, INC.

/s/ Michael R. Wack
Michael R. Wack
Vice President - Regulation & Senior Counsel
NEXTWAVE COMMUNICATIONS, INC.
1100 Pennsylvania Ave.,NW
Washington, D.C. 20004

/s/ Leonard J. Kennedy
Leonard J. Kennedy
Richard S. Denning
Dow, Lohnes & Albertson,
PLLC
1200 New Hampshire Ave.,
NW
Washington, D.C. 20036

Counsel for R&S PCS,
INC.

MARY JO WHITE
United States Attorney for the
Southern District of New York
By: DANIEL S. ALTER (DA-7158)
Assistant United States Attorney
100 Church Street – 19th Floor
New York, New York 10007
Tel. No.: (212) 637-2741

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: NextWave Personal Communications, Inc., et al., Debtors.	98 B 21529 (ASH) Chapter 11

MEMORANDUM OF LAW IN SUPPORT OF FCC'S MOTION TO LIFT AUTOMATIC STAY

Preliminary Statement

The Federal Communications Commission ("FCC") respectfully submits this memorandum of law in support of its motion pursuant to 11 U.S.C. § 362(d)(1) ("section 362(d)(1)") and Rule 4001 of the Federal Rules of Bankruptcy Procedure for an order lifting the automatic stay in the above-captioned bankruptcy case, which is currently in place pursuant to 11 U.S.C. § 362(a). The federal regulations governing the 63 C block radio spectrum licenses (the "Licenses") that debtor NextWave Personal Communications, Inc. ("NextWave") acquired through the FCC's spectrum auction program

expressly conditioned the grant of the Licenses' upon NextWave's full and timely satisfaction of its winning auction bids. The regulations also provide that, upon NextWave's failure to meet this condition, the Licenses will automatically cancel. In light of the Court's recent avoidance ruling in *NextWave Personal Communications, Inc. v. FCC*, Adv. Pro. No. 98-5178A (Bank. S.D.N.Y.), NextWave will not pay the amount of its winning bids for the Licenses. Accordingly, the FCC respectfully submits that "cause" exists under section 362(d)(1) for the Court to lift the automatic stay so that the regulations' automatic cancellation provisions may take effect.

Argument

1. The requirement that a licensee pay its winning bids to maintain its PCS licenses is the keystone of the FCC's spectrum auction program. FCC regulations condition the grant of C block licenses upon the licensee's "full and timely payment of the winning bid amount." 47 C.F.R. § 24.708(a) (emphasis added); *see also* 47 C.F.R. § 1.2109(a) (1996) (same). The regulations also "permit small businesses . . . and other entities determined to be eligible on a service specific basis, which are high bidders for licenses specified by the Commission, to pay the full amount of their high bids, in installments over the term of their licenses . . . ." 47 C.F.R. § 1.2110(e) (1996) (emphasis added). In such circumstances, "[a] license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan." 47 C.F.R. § 1.2110(e)(4) (1996). Absent some applicable grace period, however, a licensee's failure to pay its winning-bid installments in a timely manner will result in the automatic cancellation of its C block licenses. See 47 C.F.R. § 1.2110(e)(4)(iii) (1996).

2. These regulatory conditions upon the Licenses remain fully enforceable by the FCC even though NextWave is in bankruptcy. "Because the estate may take no greater interest than that held by the debtor, the estate takes the license subject to the restrictions imposed on the debtor by its transferor." *In re Farmer's Markets, Inc.*, 792 F.2d 1400, 1403 (9th Cir. 1986) (upholding condition on state liquor license requiring payment of delinquent state taxes prior to transfer of license) (internal citations omitted). Thus, "a trustee must conform in all respects to a license which comes into the estate upon the bankruptcy of a licensee; the trustee occupies the same position as the debtor, including responsibility for all burdens as well as benefits." 5 Lawrence P. King, *Collier on Bankruptcy* ¶ 541.07[3] at 541-40 (1998) (footnotes omitted); *accord In re Bay Ridge Inn, Inc.*, 94 F.2d 555, 557 (2d Cir. 1938) ("Any rights or privileges of the [bankruptcy] trustee [in debtor's liquor license] were created by the New York legislature and were subject to such conditions as it might impose.").

3. It follows that "when a debtor's proprietary interest expires by operation of an express condition, the Bankruptcy Code does not preserve that interest and prevent termination." *In re Gull Air., Inc.*, 890 F.2d 1255, 1262 (1st Cir. 1989) (debtor-airline's "filing of a bankruptcy petition did not preserve [its] interest in [FAA-allotted airport] slots and prevent that interest from automatically expiring upon [debtor's' failure to use slots as required" by FAA regulations). Indeed, given the automatic and non-discretionary nature of the regulatory cancellation provision that has been triggered by the outcome of NextWave's avoidance action against the FCC, see 47 C.F.R. § 1.2100(e)(4)(iii) (1996), the Bankruptcy Code's automatic stay is arguable altogether inapplicable to these circumstances. *See Gull Air*, 890 F.2d at 1264.

Conclusion

For the reasons stated above, the Court should grant the FCC's motion to lift the automatic stay so that the Licenses may cancel automatically.

Dated: New York, New York
May 28, 1999

Respectfully submitted,

MARY JO WHITE
United States Attorney for the
Southern District of New York
Attorney for the Federal
Communications Commission

By: /s/ Daniel S. Alter
DANIEL S. ALTER (DA-7158)
Assistant United States Attorney
100 Church Street, 19th Floor
New York, New York 10007
Tel. No.: (212) 637-2741

BRIEF OF RESPONDENTS/APPELLEES

ORAL ARGUMENT SCHEDULED

MARCH 15, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOS. 00-1402 AND 00-1403

NextWave Personal Communications Inc. and
NextWave Power Partners, Inc.,

PETITIONERS/APPELLANTS,

v.

Federal Communications Commission and
United States of America,

RESPONDENTS/APPELLEES.

BRIEF OF RESPONDENTS/APPELLEES

• • • •

Page 17

Section 362. As the Second Circuit recounted, the bankruptcy court had based its authority to overrule "the FCC's enforcement of the payment schedule established by its regulations . . . chiefly on the automatic stay provision of 11

U.S.C. § 362." JA 1061. Contrary to NextWave's contention (Br. 28), the Second Circuit's discussion of § 362 was not "perfunctory." To the contrary, virtually all of the Second Circuit's *Initial Decision*, as well as the bulk of its *Mandamus Decision*, was devoted to establishing that the Commission's decisions regarding the allocation of licenses are *regulatory* in nature. Having established that point, only a few paragraphs were necessary to reject NextWave's specific reliance on the terms of § 362. After noting that "[t]he automatic stay has its limits" because § 362(b)(4) makes clear that the stay does not apply to a "'proceeding by a governmental unit . . . to enforce such governmental unit's or

Page 18

organization's police and regulatory powers,'" the Second Circuit held that "the FCC is a governmental unit that is seeking 'to enforce' its 'regulatory power.'" JA 1061 (*quoting* § 362(b)(4)).

NextWave made the same argument to the Second Circuit that it makes to this Court: that "regulatory power" in § 362(b)(4) is limited by legislative history to some subset of regulatory actions affecting matters such as environmental or consumer protection. *See* NextWave Br. 24; JA 1275-1281. But the text of § 362(b)(4) is not limited in the manner NextWave contends and therefore, we argued in the Second Circuit, the automatic stay did not protect NextWave from the consequences of its failure to pay on time. The Second Circuit agreed and 'h[e]ld that the FCC's regulatory decisions fall within § 362(b)(4)." JA 1061 n.8.

In any event, the Second Circuit correctly rejected NextWave's reliance on § 362. As the Second Circuit emphasized, requiring timely payment serves the regulatory

purpose of "identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum," and hence § 362(b)(4) makes clear that the stay does not apply. JA 1059. But the regulatory purpose of the payment rules is not limited to preserving the presumption that the licensee is the bidder that established that it was best qualified to serve the public. The full and timely payment requirements also protect other bidders. This Court recognized in *U.S. AirWaves* that the rules requiring satisfaction of the winning bid advance the Commission's essential goals of maintaining auction integrity and fairness to losing bidders. in *U.S. AirWaves*, this Court explained that the Commission could not "simply forgive agreed-upon payments," even in the interests of achieving rapid utilization of the spectrum and furthering competition, since those statutory goals "do not absolve the agency of its duty to losing bidders." 232 F.3d at 235. This Court's decision thus confirms that the full and timely payment requirements are regulatory in

Page 19

nature. And in addition to being unfair to losing bidders, for the Commission to decline to enforce the rules against NextWave would be unfair to the many licensees that complied with the *Restructuring Orders*, almost all of whom either lost or surrendered spectrum as a result of those Orders. *See Order*, ¶ 15.

Section 362 also does not apply because cancellation occurred automatically under the Commission's rules, with no requirement for revocation proceedings or other affirmative agency action. This case is therefore analogous to the automatic withdrawal for nonuse of airline landing slots in *In re Gull Air, Inc.*, 890 F.2d 1255 (1st Cir. 1989). The bankruptcy court distinguished *Gull Air* as a case "pertaining

to regulatory non-use conditions, no vindication of the government's pecuniary interest." *See* JA 1409. The Second Circuit invalidated this rationale by explaining that the timely payment requirement serves as a regulatory, not merely a pecuniary, purpose. In any event, the main basis for the *Gull Air* decision was not the purpose of the regulation in question, but its self-executing nature. The automatic stay prevents only the "commencement" or "continuation" of some "action" against the debtor. Like the FAA in *Gull Air*, the FCC did nothing to initiate cancellation in this case.

Its self-executing nature also explains why cancellation did not violate § 362(a)(3)'s proscription against seizing estate property. "Property of the estate" is defined in § 541 of the Code to mean "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541. Congress clearly did not intend to "expand the debtor's rights against others more than they exist at the commencement of the case." H.R. Rep. No. 95-595, at 367 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 5787, 6323. *See Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984) ("whatever rights a debtor has in property at the commencement of the case continue in bankruptcy – no more, no less"). The

Page 20

nature of the property interest a debtor brings to a bankruptcy estate is determined in accordance with applicable nonbankruptcy law. *Official Committee of Unsecured Creditors v. PSS Steamship Co. (In re Prudential Lines, Inc.)*, 928 F.2d 565, 569 (2d Cir. 1991). Thus, even if NextWave's interest in the licenses can be properly characterized as a

property right,[11] that right was always delimited by the regulatory conditions placed on the licenses. NextWave had only a conditional right to use the licenses, contingent on remaining qualified to hold them by continued compliance with the Commission's auction-related rules and orders. Accordingly, no property was seized.

NextWave's heavy reliance on the bankruptcy court's decision in *In re Kansas Personal Communications Services, Ltd.*, 252 B.R. 179 (Bankr. D. Kan. 2000), is misplaced. That decision, which involved another C-block licensee whose licenses canceled in bankruptcy, was reversed by the district court one week after NextWave's brief was filed. *See Memorandum and Order*, D. Kan. Dec. 18, 2000 (Supp. App. 1494). In its opinion, the district court found that § 362(a)(3) did not apply. It recognized that, "A license to use part of the radio spectrum is a right granted by the FCC and is subject to conditions and restrictions imposed by the FCC." *Id.* *4. Stating that the issue depended on whether cancellation constituted an "act" to obtain control over the licenses, *id.* *5, the court said it would defer to the FCC's interpretation of its rules. *Id.* *6-7. The court also stated that "the plain language of the FCC regulations stating that a license 'will automatically cancel' leaves little room for interpretation." *Id.* *7, n.5.[12]

* * * *

---

[11] The Second Circuit disagreed with this premise, stating that "A license does not convey a property right," JA 41 (citations omitted), and that FCC licenses were not equivalent to "a property estate in spectrum." JA 44-45.

[12] NextWave's citation to subsections (4) and (5) of § 362(a) is likewise misplaced. As the Second Circuit held, those provisions "are concerned with liens." JA 1061 n.7.

Supreme Court, U.S.
FILED
SEP 30 2002

Nos. 01-653 and 01-657

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.

ARCTIC SLOPE REGIONAL CORPORATION, ET AL., PETITIONERS

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL RESPONSE BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

	Page
Supplemental response brief for the Federal Communications Commission	1
Appendix	1a

TABLE OF AUTHORITIES

Case:

U.S. Airwaves, Inc. v. *FCC*, 232 F.3d 227 (D.C. Cir. 2000)	3, 5

Statute and rule:

Communications Act of 1934, 47 U.S.C. 309 (1994 & Supp. V 1999)	7
Sup. Ct. R. 25.5	2

Miscellaneous:

FCC Public Notice, *Commission Seeks Comment on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to Nextwave Personal Communications Inc., Next-Wave Power Partners, Inc. and Urban Comm-North Carolina, Inc.*, FCC No. 02-248 (rel. Sept. 12, 2002)	1, 2, 4, 6
Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, In re:	
12 FCC Rcd 16,436 (1997)	3, 6
13 FCC Rcd 8345 (1998)	3, 6
Requests for Refunds of Down Payments Made In Auction No. 35, In re, 17 FCC Rcd 6283 (2002)	2

SUPPLEMENTAL RESPONSE BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

On September 12, 2002, the Federal Communications Commission (Commission or FCC) issued a Public Notice seeking comment on the disposition of down payments and license applications submitted by winning bidders in Auction 35 for the licenses previously issued to respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. FCC Public Notice, *Commission Seeks Comment on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to NextWave Personal Communications Inc., NextWave Power Partners, Inc. and Urban Comm-North Carolina, Inc.*, FCC No. 02-248 (rel. Sept. 12, 2002) (Public Notice). The FCC filed a copy of that Notice with this Court on September 13, 2002.[1] In the Public Notice, the Commission explained that, although Auction 35 took place more than 20 months ago (on January 26, 2001), the ongoing litigation in this case has prevented it from delivering the licenses to the winning bidders. Public Notice at 1-2, 5 (App., *infra*, 1a-2a, 8a). Accordingly, the Commission requested comments on whether it should return the down payments made by the winning bidders in Auction 35, and whether it should permit those bidders to withdraw their successful bids and license applications with a reduced penalty or without penalty. *Id.* at 4-5 (App., *infra*, 6a-8a).

Although the Commission's Public Notice does not appear to be sufficiently germane to warrant the filing of supplemental briefs, respondents filed such a brief on September 20, 2002. In that brief, they argue that the Public Notice "contradict[s] the FCC's central themes in this case" and confirms that the Commission's concern for auction integrity

---

[1] For the convenience of the Court, we also reproduce a copy of the Public Notice as an Appendix to this brief.

is "empty." Resp. Supp. Br. 2. Pursuant to this Court's Rule 25.5, the Commission submits this brief to address those arguments, which lack merit.

1. Respondents first contend that the Commission "reversed itself" in the Public Notice by abandoning its earlier emphasis on the importance of "auction integrity." Resp. Supp. Br. 1. That argument is misconceived. The Public Notice does not take any action at all, much less abandon the Commission's former position. It merely solicits public comments "on whether [the Commission] should *consider further*" the possibility of permitting the winning bidders in Auction 35 to withdraw their winning bids, renounce their claims to the licenses, be released from further payment obligations, and/or reclaim their down payments with a reduced penalty or no penalty. Public Notice at 4 (emphasis added) (App., *infra*, 6a).

Furthermore, far from disavowing the Commission's interest in preserving auction integrity, the Public Notice expressly reaffirms it. The Notice states that "the Commission remains concerned about protecting the integrity of its spectrum auction program" and warns that "[c]oncerns about the state of the capital markets" and the effects of litigation-created delays "must be balanced against this important public interest consideration." Public Notice at 3 (App., *infra*, 5a); see also 17 FCC Rcd 6283, 6290-6291 (¶ 12) (2002) (FCC "must protect the integrity of Auction No. 35 in the event the Commission is ultimately successful in its litigation" and "strike a balance between the hardship that would be imposed by our continuing to retain the entirety of the down payments and our need to protect the integrity of the auction."). To the extent respondents believe that any of the possible actions put out for comment in the Public Notice would have an adverse effect on auction integrity and the public interest, their concerns are properly addressed to the Commission in response to its request for comments before it takes any final agency action.

2. Respondents also suggest that the Commission's request for comments is inconsistent with its refusal to permit respondents to keep their licenses after breaching the payment conditions of those licenses, claiming that the Commission previously failed to show such sensitivity to the status of the capital markets and its effect on licensees. See Resp. Supp. Br. 2. But precisely the opposite is true. The Commission offered analogous relief to respondents and other C-Block licensees when they encountered difficulty obtaining financing in the capital markets to meet their payment obligations. See 12 FCC Rcd 16,436, 16,442 (¶ 11) (1997). Indeed, because the Commission found that it would serve the public interest, it suspended payment obligations for respondents and other C-Block licensees for more than a year even as they held the licenses, preventing the licenses from automatically canceling on nonpayment of sums that otherwise would have been due. See 13 FCC Rcd 8345, 8354 (¶ 24) (1998). And, again because the FCC determined that it would further the public interest, the FCC offered respondents and the other C-Block licensees a range of relief options at the end of that year, including an "amnesty" option under which C-Block licensees could return licenses in exchange for relief from outstanding payment obligations. See 13 FCC Rcd at 8350, 8354 (¶¶ 11-15, 24); 12 FCC Rcd at 16,439, 16,459-16,464 (¶¶ 6, 46-58).[2] Respondents, of course,

---

[2] The Commission offered respondents and other C-Block licensees four options. See generally 12 FCC Rcd at 16,439-16,440 (¶ 6); *U.S. Airwaves, Inc.* v. *FCC*, 232 F.3d 227, 231 (D.C. Cir. 2000). First, licensees could simply resume payment under the existing rules. 12 FCC Rcd at 16,439 (¶ 6). Second, under the amnesty option, licensees could surrender their licenses for re-auction in exchange for amnesty from further payment obligations. 13 FCC Rcd at 8357-8360 (¶¶ 31-37). Third, licensees could return some of their licenses in exchange for release from payment conditions on those licenses and the right to apply 70% of their downpayments on the returned licenses to payment for licenses they chose to retain. *Id.* at 8360-8366 (¶¶ 38-48). Fourth, and in addition, the licensees could disaggregate 30 MHz licenses, return 15 MHz, and be relieved of

chose not to avail themselves of those opportunities. Having been offered and having rejected analogous administrative relief designed to alleviate the financial consequences of market downturns and other factors—including options that would have allowed them to return their licenses to the FCC for re-auction in exchange for eliminating the payment obligations they could not meet—respondents have no basis for objecting to the Commission's request for comments on whether it should offer similar relief to Auction 35 winning bidders.

Respondents, moreover, ignore the fundamental difference between themselves and the Auction 35 winning bidders—the fact that the winning bidders in Auction 35 never received their licenses. Although Auction 35 closed more than 20 months ago, continuing and unresolved litigation has prevented the Commission from delivering the licenses to Auction 35's winning bidders. Public Notice at 5 (App., *infra*, 8a). In light of the past and potential future delays,[3] as well as pending litigation between the Commission and certain Auction 35 bidders that could further delay utilization of the spectrum if or when licenses are delivered (Public Notice at 2-3, 5 (App., *infra*, 3a-5a, 6a)), it is not unreasonable for the Commission to consider whether it would be in the public interest to relieve the Auction 35 bidders from their current obligations.

The difference between the winning bidders in Auction 35 and respondents necessarily means that the considerations before the Commission will not be identical. In contrast to the Auction 35 winning bidders, respondents failed to make the payments on which their licenses were conditioned *after*

---

half the payment responsibility associated with the disaggregated licenses. *Id.* at 8366-8371 (¶¶ 49-60).

[3] Even if this Court resolves the pending litigation in the government's favor, the Commission explained, "there may nevertheless be unresolved issues over the licenses, that would prolong the litigation." Public Notice at 5 (App., *infra*, 8a).

receiving the licenses. As a result, in respondents' case, the FCC could evaluate whether to enforce the terms of the licenses, or whether factors (such as those that led the Commission to suspend the payment obligations of all C-Block licensees for more than a year, and whether a carrier was already providing service under the license) tipped the public interest analysis in favor of relaxing the payment obligation or waiving a breach. The same analysis does not apply to the winning bidders in Auction 35 because they obviously have not violated the terms of, or provided service under, licenses they have not yet received.

3. Ultimately, the Public Notice confirms precisely what respondents have refused to acknowledge throughout this litigation—that the Commission's conduct of the auction program, and its consideration of relief from payment conditions and automatic cancellation rules, are informed by its judgment and expertise in furtherance of its statutory obligation to allocate licenses in the public interest. Thus, in the case before this Court, the Commission sought comment on various forms of relief for respondents and other C-Block licensees. It determined that the *public interest* favored waiving the Commission's rules to suspend respondents' and other C-Block licensees' payment obligations for more than a year. And it determined that the public interest supported suspending the Commission's rules to allow them to retain their licenses under various restructuring options, or to return their licenses under an amnesty option, *U.S. Airwaves, Inc.* v. *FCC*, 232 F.3d 227, 235 (D.C. Cir. 2000) (FCC "determined that the statutory goals * * * required it to liberalize the financial terms available to C-Block licensees"), even though returned licenses were re-auctioned at a loss, Gov't Reply Br. 18.[4] The FCC also considered, but rejected

---

[4] By re-auctioning the licenses—even at a loss—the Commission accomplished the statutory goal of placing the licenses in the hands of those prepared to place the spectrum into rapid and intensive use by offering service to public benefit. By attempting to circumvent the

as contrary to the public interest, proposals to extend the suspension of payments beyond the more-than-one-year suspension period. 12 FCC Rcd at 16,446-16,447 (¶ 18); 13 FCC Rcd at 8348, 8354 (¶¶ 7, 24). Likewise, the FCC considered, but rejected as contrary to the public interest, permitting respondents to retain their licenses after they rejected the restructuring options and breached the licenses' payment condition, because such relief would undermine auction integrity and because respondents were "providing no service," were "not in commercial operation," and had left valuable spectrum "unused" for more than three-and-a-half years. Pet. App. 71a, 78a, 82a.

In the Public Notice that is the subject of respondents' supplemental brief, the Commission similarly has asked for comment on whether the public interest might support suspending its rules to allow bidders who have not yet received their licenses, and might not receive them for some time, to withdraw their bids with a reduced penalty or no penalty. It specifically sought comment on whether the identified alternatives would "promote or disserve the public interest objectives outlined in Section 309(j) of the Communications Act, including 'promoting economic opportunity and competition' and ensuring 'efficient and intensive use of the electromagnetic spectrum.' 47 U.S.C. § 309(j)(3)(B) & (D)." Public Notice at 5 & n.15 (App., *infra*, 8a & n.15).[5]

---

options provided by the FCC, respondents have caused the spectrum to remain unutilized to this day.

[5] As respondents point out (Resp. Br. 14-15), current economic conditions make it possible if not likely that any re-auction at this point would generate less than the $15 billion bid in Auction 35. The Commission's willingness to consider permitting the Auction 35 bidders to withdraw their bids with a reduced penalty or no penalty—despite the fact that such withdrawal would harm the government's financial interests—further contradicts the claim of respondents' amici (*e.g.*, Urban Comm-North Carolina, Inc., *et al.*) that the Commission is pursuing financial rather than regulatory goals.

Critically, in each situation, the licensing policy decision—not merely the establishment of the rules but also the consideration of potential discretionary relief—is one that Congress has delegated to the Commission under the public interest standard of the Communications Act, 47 U.S.C. 309. In each situation, the Commission retains discretion to provide relief from its rules, whether those rules impose regulatory obligations or provide for license cancellation, if the public interest so requires. In gauging the public interest, the Commision must weigh a number of factors, including auction integrity and the efficient, rapid, and intensive use of spectrum in the public interest that auctions are designed to promote. Nothing in the Bankruptcy Code or respondents' supplemental brief suggests that Congress intended the Bankruptcy Code to displace the Commission's exercise of its expertise and judgment in such matters.

* * * * *

For the foregoing reasons and those stated in our briefs, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General[*]

SEPTEMBER 2002

---

[*] The Solicitor General is disqualified in this case.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
445 TWELFTH STREET, S.W.
WASHINGTON, D.C. 20554 FCC 02-248

News Media information 202/418-0500 Fax-On-Demand 202/418-2830 Internet: http://www.fcc.gov ftp.fcc.gov

Released: September 12, 2002

COMMISSION SEEKS COMMENT ON DISPOSITION OF DOWN PAYMENTS AND PENDING APPLICATIONS FOR LICENSES WON DURING AUCTION NO. 35 FOR SPECTRUM FORMERLY LICENSED TO NEXTWAVE PERSONAL COMMUNICATIONS INC., NEXTWAVE POWER PARTNERS, INC. AND URBAN COMM-NORTH CAROLINA, INC.

WT Docket No. 02-276

Auction Event No. 35

Comment Date: October 11, 2002
Reply Comment Date: October 21, 2002

BACKGROUND

On March 26, 2002, the Commission granted partial refunds of the down payments made by certain winning bidders in Auction No. 35.[1] These winning bidders had made down payments and filed long-form applications for spec-

[1] Requests for Refunds of Down Payments Made In Auction No. 35, *Order*, FCC 02-99 (rel. Mar. 27, 2002) ("*Partial Refund Order*").

trum associated with licenses that had previously been issued to NextWave Personal Communications Inc., NextWave Power Partners Inc. (collectively "NextWave") and Urban Comm-North Carolina, Inc. ("Urban Comm"). This spectrum, as well as Auction No. 35, continues to be the subject of extensive litigation and pending regulatory proceedings.[2] Key issues over the effectiveness of the Commission's automatic [2] cancellation rules with respect to NextWave's licenses are scheduled for oral argument before the Supreme Court on October 8, 2002.[3]

Pursuant to the *Partial Refund Order*, the Commission has already refunded approximately $2.8 billion to the Auction No. 35 winning bidders who have not yet received their licenses, but it retained an amount equal to three percent of the net winning bids for these licenses and maintained the pending status of the applications for these licenses. The

[2] *NextWave Personal Communications Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *cert. granted*, __ U.S. __ , 70 U.S. L.W. 3317, 70 U.S.LW. 3545, 70 U.S.L.W. 3351 (March 4, 2002) (Nos. 01-653, 01-657); *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999); *Cellco Partnership d/b/a Verizon Wireless v. FCC*, D.C. Cir. No. 02-1110 (filed April 8, 2002); *Cellco Partnership d/b/a Verizon Wireless v. United States*, C.F.C. No. 02-280c (filed April 5, 2002); *In re Urban Comm-North Carolina, Inc.*, Case No. 98-B-10086 (REG), Adv. Proc. No. 99/8125A; Applications for Review, dated March 17, 1997 and June 16, 1997, filed by Antigone Communications, L.P. and PCS Devco, Inc.; Petition to Initiate an Investigation and Audit Regarding the Eligibility of NextWave Personal Communications, Inc. and NextWave Power Partners Inc. to Hold C and F Block licenses, filed by Alaska Native Wireless, L.L.C., Verizon Wireless, and VoiceStream Wireless Corporation, dated July 19, 2001; Petition for Reconsideration, filed by Alaska Native Wireless, L.L.C. and VoiceStream Wireless Corporation, dated October 12, 2001; Petition to Deny Reinstatement of Licenses, filed by Alaska Native Wireless, L.L.C., and VoiceStream Wireless Corporation, dated August 30, 2001.

[3] *See FCC v. NextWave Personal Communications Inc., cert. granted*, __ U.S. __, 70 U.S.L.W. 3317, 70 U.S.L.W. 3545, 70 U.S.L.W. 3551 (U.S. March 4, 2002) (Nos. 01-653, 01-657).

total amount still on deposit with the Commission is $489,548,061. The total amount of these Auction No. 35 winners' obligations, including the refunded down payments, to the government for the former NextWave and Urban Comm licenses won at the auction is $16,318,268,700. The Commission has already received $504,419,150 in final payments for other licenses won and granted based on Auction No. 35.

As noted in the *Partial Refund Order*, the Commission was sympathetic to the needs of the auction winners, many of whom are small businesses, to have access to their funds to continue to operate their businesses. At the same time, the Commission held that it must protect the integrity of Auction No. 35 in the event the Commission is ultimately successful in its litigation. It therefore struck a balance between the hardship that would be imposed by continuing to retain the entirety of the down payments and the need to protect the integrity of the auction. Accordingly, it refunded to the payors of record a substantial portion of the monies on deposit.

However, the Commission's *Partial Refund Order* also found, *inter alia*, that the continued litigation associated with particular licenses *did not* relieve the winning bidders of the obligation to pay their full bid amounts for licenses won in Auction No. 35. In this regard, the Commission disposed of matters raised by Verizon in a letter to the Commission's Deputy General Counsel in which Verizon argued that it no longer had an obligation to pay the amount it bid in Auction No. 35 based on the theory that spectrum auctions create contractual relationships between the Commission and winning bidders, and that the Commission's failure to make timely delivery of the licenses rendered the contract void.[4] No other Auction No. 35 applicant advanced this con-

[4] *Partial Refund Order* at 9-10, para. 14-16.

tract theory. In response to Verizon's letter, the *Partial Refund Order* stated that auctions are a regulatory mechanism for distributing licenses and that the relationship between the Commission and winning bidders of spectrum licenses is governed by the Communications Act, the Commission's competitive bidding regulations, and Public Notices setting forth specific conditions on particular auctions. Those conditions, the Commission stated, included the auction's contingency on the "final"outcome of the *NextWave* litigation.[5] [3] Therefore, the Commission held that the fact that spectrum associated with the former NextWave licenses was not yet available for use by the Auction No. 35 winning bidders did not require the Commission to relieve Verizon of its bid obligations.[6]

Verizon challenged the Commission's *Partial Refund Order* in two courts.[7] In the D.C. Circuit, in case No. 02-1110, Verizon seeks a ruling that the delay in licensing caused by the NextWave litigation entitles Verizon to declare its auction obligations void. In the Court of Federal Claims, in case No. 02-280c, Verizon seeks a declaration nullifying Auction No. 35 as well as consequential damages. We stand by our legal conclusions in the *Partial Refund Order*, and do not

---

[5] *Id.* at 9, para. 15.

[6] *Id.* at 9, para. 16.

[7] *See Cellco Partnership d/b/a Verizon Wireless v. FCC*, D.C. Cir. No. 02-1110 (filed April 8, 2002); *Cellco Partnership d/b/a Verizon Wireless v. United States*, C.F.C. No. 02-280c (filed April 5, 2002). The case pending in the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") is at the briefing stage—Verizon Wireless's opening brief is due November 22, 2002, followed by the FCC's brief on January 8, 2003, and Verizon's reply on February 6, 2003. Oral argument is scheduled for April 15, 2003. In the case pending before the Court of Federal Claims, the government has requested that this case be held in abeyance pending disposition by the D.C. Circuit of the related case and the Supreme Court of the NextWave case.

through this Public Notice suggest any support for Verizon's legal argument.

DISCUSSION

Since the Commission issued its *Partial Refund Order* several months ago, the state of the capital markets for entities, including the applicants, engaged in the provision of wireless telecommunications services, as well as other telecommunications services, has continued to decline rapidly. Specifically, since March, the Commission has received submissions asserting that unique and troubling financial circumstances have led to difficulties in accessing capital and other problems for companies of all sizes, which in turn has affected the customers they serve.[8] For instance, these commenters suggest that the impact of continuing contingent liabilities on credit ratings in the midst of a severe downturn in capital markets could potentially frustrate other policy objectives as well as quality of service. Moreover, as we have seen in the past,[9] market downturns affect the value of spectrum licenses won at auction and licensees' (or applicants') ability to meet auction payment obligations. At the same time, the Commission remains concerned about protecting the integrity of its spectrum auction program.[10] Concerns about the state of the capital markets must be balanced against this important public interest consideration.

---

[8] *See* Letter to Michael K. Powell, Chairman, FCC, from Peter C. Crampton, *et al.*, at p.2 (Aug. 16, 2002); *see also* Letter to Michael K. Powell, Chairman, FCC, from Thomas E. Wheeler, Cellular Telecommunications & Internet Assoc., at p. 2 (Aug. 13, 2002).

[9] *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 12 FCC Rcd 16,436 (1997) (*C Block Restructuring 2nd R & O*), *on recon.* 13 FCC Rcd 8345 (1998) (*Recon. of C Block Restructuring 2nd R & O*), *aff'd*, *U.S. Airwaves Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000).

[10] *C Block Restructuring 2nd R & O* , 12 FCC Rcd 16,436, para. 2-3 (1997).

[4] Taking official notice of the status of the capital markets and other economic events, the Commission, on its own motion, seeks comment on the observations in the paragraph above and whether it should take further action with regard to the pending applications for licenses won during Auction No. 35 for spectrum formerly licensed to NextWave and Urban Comm.

Specifically, we seek comment on whether we should consider further, *inter alia*, the following scenarios:

(1) Full Refund and Option to Dismiss All Pending Applications. Upon request, the Commission would refund to the payor of record the full amount of monies on deposit with the Commission for the licenses subject to the NextWave litigation and Urban Comm proceedings. The Commission would also provide a period of time for individual applicants to request voluntary dismissal of all of their applications, with prejudice.

Under this scenario, applicants obtaining a full refund and choosing to dismiss their applications would lose all claims to the affected Auction No. 35 licenses.[11] Should the Commission prevail in the litigation, new initial licenses for the spectrum would be assigned by auction at a future date. In addition, the Commission would waive, in whole or part, its default rules for these licenses and, subject to coordination with the Department of Justice pursuant to applicable federal claims collection standards,[12] forgive the debt incurred on them at Auction

[11] In addition to relinquishing any and all claims on the Auction No. 35 licenses, the bidder would also be required to release any other claims against the United States and the FCC arising out of Auction 35.

[12] *See* 4 C.F.R. Parts 101-105; *C Block Restructuring 2nd R & O*, 12 FCC Rcd 16436, para. 53-58 (1997); *U.S. Department of Justice Approves Debt Forgiveness for Personal Communications Services (PCS) C Block*, DA 98-1051, Public Notice (June 3, 1998).

No. 35. We seek comment on whether it would be advisable to waive the default rules, or to extend debt forgiveness, in whole or in part, to a bidder opting for dismissal of its application(s). In addition, we seek comment on whether a bidder receiving a waiver or debt forgiveness should be barred from participating in the reauction of the licenses or otherwise obtaining such licenses for a period of time.[13] Finally, we seek comment on whether applicants that would like to keep their applications pending should reaffirm their commitment to their Auction No. 35 obligations or just remain silent.

(2) Selective Opt-Out for Pending Applications. The Commission would grant individual applicant requests for voluntary dismissal of their applications, with prejudice, for certain licenses and not others.

[5] Under this scenario, the Commission would provide applicants the opportunity to pick and choose licenses for which to keep the applications pending and which to dismiss.[14] We seek comment on whether all of the down payments should be refunded or only down payments associated with the dismissed licenses. As with the above scenario, applicants choosing to dismiss their applications would lose all claims to the affected licenses. Should the Commission prevail in the litigation, new initial licenses for the spectrum would be assigned by auction at a future date. In addition, the Commission would, in whole or part, waive its default rules for

[13] We note that in the C-block debt restructuring proceeding, licensees that surrendered licenses pursuant to the various options, under certain circumstances, were deemed ineligible to reacquire their surrendered licenses through reauction or by any other means for a period of two years from the start date of the next reauction. *Recon. of C Block Restructuring 2nd R & O*, 13 FCC Rcd 8345, para. 37 (1998).

[14] *Id.* at para. 34-37.

dismissed license applications and, subject to coordination with the Department of Justice pursuant to applicable federal claims collection standards, forgive the debt on them incurred at Auction No. 35. Again, we seek comment on whether a bidder opting for dismissal of its application(s) and receiving a full or partial waiver of the default payment rules should be barred from participating in the reauction of the licenses or otherwise obtaining such licenses for a period of time.

Although the oral argument in the Supreme Court case is fast approaching and the Commission has the utmost confidence in the merits of its case, the Commission and winning bidders in Auction No. 35 still face the possibility of prolonged litigation over such licenses during uncertain and trying economic conditions. We also recognize that should the Supreme Court rule in the government's favor, there may nevertheless be unresolved issues over the licenses, that would prolong the litigation. Depending on the length of the delay, capital market conditions may continue to change, increasing the possibility that winning bidders in Auction 35 will be in a significantly different position tha[n] at the time of the auction. Accordingly, we seek comment on the scenarios discussed above based on the changed circumstances since issuance of our *Partial Refund Order*. We also seek comment on whether granting relief under any of the options discussed herein would promote or disserve the public interest objectives outlined in Section 309(j) of the Communications Act, including "promoting economic opportunity and competition" and ensuring "efficient and intensive use of the electromagnetic spectrum."[15]

[15] 47 U.S.C. § 309(j)(3)(B) & (D).

PROCEDURAL MATTERS

Pursuant to 47 C.F.R. § 1.1200(a), the Commission may adopt modified *ex parte* procedures in particular proceedings if the public interest so requires. Accordingly, issues related to this Public Notice will be governed by "permit-but-disclose" *ex parte* procedures that are applicable to non-restricted proceedings under 47 C.F.R. § 1.1206.[16] Designating this matter as "permit but disclose" will provide an opportunity for all interested parties to comment on the policy questions concerning the treatment of the funds on deposit. All other matters concerning Auction No. 35 applications that are the subject of NextWave's Petition to Defer[17] and other [6] petitions to deny remain restricted, pending further action by Public Notice.

Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before September 30, 2002, and reply comments on or before October 15, 2002. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal

[16] Parties making oral ex parte presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subject discussed. More than a one or two sentence description of the views and arguments presented generally is required. *See* 47 C.F.R. § 1.1206(b)(2).

[17] NextWave's Petition to Defer or, in the Alternative, to Condition Grant (filed March 9, 2001); Reply Comments of Verizon Wireless (filed March 16, 2001).

screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Marlene H. Dortch, Secretary, Office of the Secretary, Federal Communications Commission.

Action by the Commission on September 11, 2002: Chairman Powell, Commissioners Abernathy and Martin with Commissioner Copps concurring and issuing a statement.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

CONCURRING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

RE: Commission seeks comment on disposition of down payments and pending applications for licenses won during Auction No. 35 for spectrum formerly licensed to NextWave Personal Communications Inc., NextWave Power Partners, Inc. and Urban Comm—North Carolina, Inc. (Auction Event No. 35)

I believe that there are strong equitable arguments to support returning the remaining funds on deposit related to Auction 35, and even for dismissing all pending applications related to that auction. But I am frankly somewhat concerned about the timing of today's Public Notice, as drafted. I have been in this town long enough to know that there is something called the Law of Unintended Consequences, and I never underestimate its power. I must, therefore, concur rather than approve of this action.

(21) (18)

Nos. 01-653 & 01-657

Supreme Court, U.S.
FILED
SEP 30 2002
CLERK

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,

Respondents.

ARCTIC SLOPE REGIONAL CORPORATION, COUNCIL TREE COMMUNICATIONS, LLC, AND VOICESTREAM WIRELESS CORPORATION,

Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS ARCTIC SLOPE REGIONAL CORPORATION, *et al.*

MICHELE C. FARQUHAR
JONATHAN S. FRANKLIN*
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

6 pp

IN THE

Supreme Court of the United States

Nos. 01-653 & 01-657

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

and

ARCTIC SLOPE REGIONAL CORPORATION, *et al.*,

Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

SUPPLEMENTAL BRIEF FOR PETITIONERS ARCTIC SLOPE REGIONAL CORPORATION, *et al.*

Pursuant to S. Ct. Rule 25.5, petitioners Arctic Slope Regional Corporation, *et al.*[1] submit this supplemental brief in response to the supplemental brief filed September 20, 2002 by respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. ("NextWave"). In that brief, NextWave asserts that a recent FCC Public Notice,

---

[1] Effective September 1, 2002, the corporate name of petitioner VoiceStream Wireless Corporation was changed to T-Mobile USA, Inc.

issued September 12, 2002, undermines petitioners' position in this case.[2] As explained below, NextWave is mistaken.

In Auction 35, which was held before the D.C. Circuit's decision in this case, the FCC reauctioned licenses previously held by NextWave and Urban Comm-North Carolina, Inc., another bankrupt licensee. Petitioners in No. 01-657, or entities in which they have interests, were among those winning bidders. In the recent Public Notice, the FCC invites public comment on two proposals that would allow winning bidders for the NextWave and Urban Comm licenses to renounce some or all of their bids and obtain full or partial refunds of their down payments. The principal reason for the proposed action is the delay caused by this litigation, which has so far prevented the FCC from awarding licenses to the winning bidders. *See* Public Notice at 1. The FCC previously refunded a substantial portion of the winning bidders' down payments. *See id.* at 2. Now, recognizing that the ongoing delay in receiving licenses may pose hardships for many of those bidders, the FCC has decided to consider "whether it should take further action with regard to the pending applications for licenses won during Auction 35." *Id.* at 3-4.

The Public Notice thus deals solely with the *reauction* of NextWave's licenses, and has no bearing on the central issue in this case—whether Section 525 of the Bankruptcy Code prevented the FCC from *canceling* NextWave's licenses in the first place notwithstanding the FCC's determination that NextWave's continued hold on the Nation's airwaves disserves the public interest. As explained in petitioners' briefs, Section 525 does not prevent the FCC from taking such

---

[2] *See* Public Notice, *Commission Seeks Comments on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to NextWave Personal Communications Inc., NextWave Power Partners, Inc. and Urban Comm – North Carolina, Inc.*, FCC 02-248 (Sept. 12, 2002).

regulatory action. That question is separate from the question of how the FCC will reallocate the licenses once it is able to take them back from NextWave.

Contrary to NextWave's contention, the Public Notice in no way contradicts the FCC's determination that NextWave's default on its winning bid demonstrated that it was not the licensee most likely to serve the public interest. In fact, the recent Notice is entirely consistent with the FCC's actions toward NextWave and other C-Block licensees. When NextWave encountered financial difficulties, it was given the option of surrendering some or all of its licenses in exchange for full or partial forgiveness of its remaining payment obligations. *See* Arctic Slope Br. 11-12; Reply Br. 7. In the recent Notice, the FCC is merely considering giving the Auction 35 winning bidders a similar option. Indeed, the FCC was even more generous to NextWave, which had already received its licenses when it was offered forgiveness. NextWave chose instead to default. Unlike NextWave, however, no winning Auction 35 bidder addressed by the Public Notice ever defaulted on a license condition, because these bidders were never able to receive the licenses through no fault of their own.

Thus, the FCC has consistently maintained that a licensee may not do precisely what NextWave now says it has the absolute right to do—retain licenses without complying with a legitimate regulatory condition and without ever having to pay what it promised. Indeed, the very circumstance that prompted the Notice—the delay caused by NextWave's own bankruptcy and litigation tactics—shows that NextWave's interpretation of Section 525 undermines Congress's expressed goal of using auctions to ensure "the development and rapid deployment of new technologies, products, and services for the benefit of the public * * * without administrative or judicial delays." 47 U.S.C. § 309(j)(3)(A). Section 525 should thus be properly interpreted to allow the FCC to enforce its cancellation regulations in order to carry out

Congress's intent that spectrum licenses be available—"without administrative or judicial delays," *id.*—to companies that the FCC determines will further the public interest. Otherwise, the public will continue to suffer as insolvent companies like NextWave continue to warehouse scarce spectrum in bankruptcy litigation, resulting in more delays of the sort that prompted the recent Public Notice.

To the extent the Notice is relevant to this case at all, it underscores that the proper regulation of spectrum auctions is fundamentally a matter for the FCC—not bankruptcy courts or bankrupt companies—to decide (subject, of course, to appropriate review in the Courts of Appeals). The FCC is now considering important regulatory issues regarding the reauction of the NextWave licenses, just as it earlier considered other complex regulatory issues when determining the extent to which NextWave's payment deadlines and obligations should be modified. The Bankruptcy Code does not, and cannot, prevent the FCC from exercising its regulatory authority to reclaim exclusive licenses to use the public airwaves from an entity that is not serving the public interest, in order to get the licenses into the hands of others that will.[3]

[3] Finally, the recent Public Notice belies NextWave's contention that the FCC's actions with regard to NextWave's licenses are motivated by a pecuniary desire to increase revenues for the Treasury. In light of recent market conditions, it is widely believed that the winning bids in a new reauction of those licenses would be less than the winning bids in Auction 35, which was completed in January 2001. Yet the FCC is nonetheless considering that option, just as it reauctioned the licenses returned by other C-Block licensees at a loss. *See* FCC Reply Br. 18.

CONCLUSION

For the foregoing reasons, and those in petitioners' opening and reply briefs, the judgment below should be reversed.

Respectfully submitted,

MICHELE C. FARQUHAR
JONATHAN S. FRANKLIN*
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

* Counsel of Record

Counsel for Petitioners

RECEIVED
JUN 27 2002
OFFICE OF THE CLERK

Nos. 01-653, 01-657

FILED
JUN 21 2002
OFFICE OF THE CLERK

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,
v.
NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORP., *et al.*, *Petitioners*,
v.
NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF AIRADIGM COMMUNICATIONS, INC. IN SUPPORT OF RESPONDENTS

RICHARD P. BRESS
Counsel of Record
JAMES F. ROGERS
WILLIAM S. CARNELL

LATHAM & WATKINS
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004
202-637-2200

Counsel for Amicus Curiae

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THE COMMUNICATIONS ACT DOES NOT REQUIRE THE AUTOMATIC CANCELLATION OF LICENSES FOR UNTIMELY INSTALLMENT PAYMENTS IN BANKRUPTCY 7

II. AUTOMATIC CANCELLATION OF LICENSES FOR UNTIMELY PAYMENT FINDS LITTLE SUPPORT IN THE PROVISIONS AND PURPOSES OF THE COMMUNICATIONS ACT 12

A. Automatic Cancellation Conflicts With The Purposes Of The Communications Act. 12

B. The FCC's Paramount Focus On Strict Market-Based Allocation Is A Path Rejected By Congress. 16

C. Automatic Cancellation Is Unnecessary To Promote Allocative Efficiency. 19

1. Installment Payments Lack The Significance Of Down Payments. 19

2. Timely Payment Lacks The Significance Of Full Payment. 21

D. Automatic Cancellation Would Not Advance The Communications Act's Goal Of Minimizing Transaction Costs 24

E. Protections Less Draconian Than Automatic Cancellation Are Sufficient To Ensure The Integrity Of Auctions. 25

III. IN ANY EVENT, THE FCC SHOULD RETAIN AUTHORITY TO WAIVE ITS CANCELLATION RULE OR REINSTATE LICENSES 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Alabama v. Bozemon,
533 U.S. 146 (2001) 12

Dunes Hotel Associates v. Hyatt Corp.,
245 B.R. 492 (D.S.C. 2000) 26

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 7, 8

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 19

In re Bowman,
181 B.R. 836 (Bankr. D. Md. 1995) 27

Kokoszka v. Belford,
417 U.S. 642 (1974) 19

Mountain Solutions, Ltd. v. FCC,
197 F.3d 512 (D.C. Cir. 1999) 20, 21

NLRB v. Bildisco & Bildisco,
465 U.S. 513 (1984) 9, 10, 11

Tennessee Valley Authority v. Hill,
437 U.S. 153 (1978) 19

United States v. Larionoff,
431 U.S. 864 (1977) 11

United States v. Locke,
529 U.S. 89 (2000) 11

WAIT Radio v. FCC,
418 F.2d 1153 (D.C. Cir. 1969) 28, 29

STATUTES

5 U.S.C. § 706 28
11 U.S.C. § 525(a) 9
11 U.S.C. § 1112(b) 26
47 U.S.C. § 309 28
47 U.S.C. § 309(j)(2) 12
47 U.S.C. § 309(j)(3) 4, 5, 10, 12, 13
47 U.S.C. § 309(j)(3)(A) 1, 25
47 U.S.C. § 309(j)(3)(B) 14, 15, 16
47 U.S.C. § 309(j)(3)(C) 13
47 U.S.C. § 309(j)(4)(A) 9, 14
47 U.S.C. § 309(j)(4)(B) 13, 14
47 U.S.C. § 309(j)(4)(C) 13
47 U.S.C. § 309(j)(4)(D) 13
47 U.S.C. § 309(j)(4)(E) 13
47 U.S.C. § 309(j)(6) 11
47 U.S.C. § 765f 12
Pub. L. No. 103-66, 107 Stat. 312 (1993) 19
Pub. L. No. 105-33, § 3002(a), 111 Stat. 251, 258 (1997) 8

REGULATIONS

47 C.F.R. § 1.2105(a)(2)(x) 27
47 C.F.R. § 1.2106(a) 27
47 C.F.R. § 1.2109 27
47 C.F.R. § 1.2110(g)(3) 8
47 C.F.R. § 1.2110(g)(3)(ii) 21
47 C.F.R. § 1.925 28
47 C.F.R. § 24.15 21
47 C.F.R. § 24.720(b)(2) 1

REGULATORY MATERIAL

Airadigm Communications, Inc., Petition for Reinstatement, DA 00-68 (filed Feb. 7, 2000) 26

AMK International, Inc.,
12 F.C.C.R. 1511 (WTB 1997) 29

Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order,
12 F.C.C.R. 16436 (1997) 10

Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rulemaking,
12 F.C.C.R. 16436 (1997) 24

Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order,
11 F.C.C.R. 7824 (1996) 25

CSS Communications, Co.,
12 F.C.C.R. 1507 (WTB 1997) 29

Cenkan Towers, L.L.C.,
12 F.C.C.R. 1516 (WTB 1997) 29

Geotek Communications, Inc., Debtor-In-Possession, Memorandum Opinion and Order,
15 F.C.C.R. 790 (WTB 2000) 25

Hickory Telephone Co.,
12 F.C.C.R. 1528 (WTB 1997) 29

Installment Payments for PCS Licenses, Order, 12 F.C.C.R. 17325 (WTB 1997) 24

Lakeland PCS LLC, Second Order on Reconsideration, 15 F.C.C.R. 23733 (WTB 2000) 29

Liberty Cable Co., 11 F.C.C.R. 14133 (1996) 4

Longstreet Communications International, Inc., Order, 12 F.C.C.R. 1549 (WTB 1997) 20, 29

MFRI, Inc., 12 F.C.C.R. 1540 (WTB 1997) 29

MobileMedia Corp., Memorandum Opinion and Order, 14 F.C.C.R. 8017 (1999) 15

Mountain Solutions Ltd., Memorandum Opinion and Order, 3 F.C.C.R. 21983 (1998) 20, 21

Petition for Declaratory Ruling Concerning the Requirement of Good Faith Negotiations, Memorandum Opinion and Order, PR Dkt. No. 93-144 (WTB rel. Mar. 2, 2001) 26

Public Notice, "Auction of C and F Block Broadband PCS License," DA 00-49 (Jan. 12, 2000) 3

Public Notice, "Entrepreneurs' C Block Auction Closes," DA 96-716 (May 8, 1996) 2

Public Notice, "U.S. Department of Justice Approves Debt Forgiveness," DA 98-1051 (June 3, 1998) 10

RFW, Inc., 2 F.C.C.R. 1536 (WTB 1997) 29

Requests for Extension of the Commission's Initial Non-Delinquency Period, Order, 13 F.C.C.R. 22071 (1998) 2

Roberts-Roberts & Associates, L.L.C., 12 F.C.C.R. 1825 (WTB 1997) 29

Second Thursday Corp., 2 F.C.C.2d 515 (1990) 4, 15

Southern Communications Systems Inc., Order, 2 F.C.C.R. 1532 (WTB 1997) 20

The Wireless, Inc., 2 F.C.C.R. 1821 (WTB 1997) 29

LEGISLATIVE MATERIAL

139 Cong. Rec. 2348 (1993) 18

Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1988: Hearings before a Subcomm. of the Senate Comm. on Appropriations on H.R. 2763, 100th Cong. 14 (1987) 16, 17, 18

Emerging Telecommunications Technologies: Hearings before the Subcomm. on Telecomm. and Finance of the House Comm. on Energy and Commerce on H.R. *2965*, 101st Cong. 28 (1990) 17

FCC Reauthorization: Hearing before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp., 102d Cong. 21 (1991) 16, 17

H.R. Rep. No. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963 3

H.R. Rep. No. 103-111 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378 18

Spectrum Auctions: FCC Proposals for the Airwaves: Hearing before the Subcomm. on Telecom., Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 99th Cong. 1 (1986) 16, 17

OTHER AUTHORITY

7 *Collier on Bankruptcy* (Alan N. Resnick et al. eds., 15th ed. rev. 2002) 26

Margaret Graham Tebo, *A New Chapter*, 87 A.B.A.J. 46 (July 2001) 23

Mary Greczyn, *Bankrupt Airadigm Awaits FCC Decision on C-Block Licenses*, Communications Daily, Vol. 21, No. 32 (Feb. 15, 2001) 4

INTEREST OF AMICUS CURIAE[1]

Airadigm Communications, Inc., is a "very small business" under the FCC's rules, 47 C.F.R. § 24.720(b)(2), that operates PCS systems in Wisconsin and Iowa, using entrepreneurs' block licenses it won at auction. After investing millions of dollars to build its network, Airadigm now provides service to more than 30,000 subscribers, most of them in rural areas and many on tribal lands. Even after filing a petition in bankruptcy, Airadigm has continued to serve the public and fulfill the statutory goal of deploying "new technologies, products, and services for the benefit of the public, including those residing in rural areas." 47 U.S.C. § 309(j)(3)(A).

Like Respondents NextWave Personal Communications, Inc. and NextWave Power Partners, Inc. (collectively, "NextWave"), Airadigm temporarily ceased making debt payments to the FCC and to its other creditors while it was in bankruptcy. Airadigm has a strong interest in, and a unique and valuable perspective on, this case because, despite Airadigm's build-out and service to more than 30,000 subscribers, the FCC has taken the position that Airadigm's PCS licenses, like NextWave's, are subject to automatic cancellation. Moreover, reference to Airadigm's particular experience may aid the Court's consideration of this case, for Airadigm is precisely the innovative entrepreneur that Congress required the FCC to promote—such that the FCC's attempt to cancel Airadigm's licenses dramatizes the wrongfulness of the automatic cancellation policy.

More particularly, Airadigm is a joint venture between a subsidiary of the Oneida Nation (a tribe of Native Americans with lands in rural Wisconsin) and Wisconsin Wireless Communications, Inc., itself a very small business. In the FCC's C and F Block auctions, Airadigm won 15 PCS

---

[1] This brief was authored entirely by counsel for Amicus Curiae Airadigm Communications, Inc. No person or entity other than Airadigm made a monetary contribution to its preparation.

licenses covering most of Wisconsin and part of northeastern Iowa.[2] The overwhelming majority of this service territory is rural.

Airadigm bid a total of about $71.5 million for the licenses. It timely made its down payments, and after that made three installment payments. To date, it has paid approximately $13 million to the FCC. Immediately upon receiving its licenses, moreover, Airadigm began implementing an ambitious service plan. It was the first non-pioneer's preference licensee to begin offering service in the C Block, and has now built out an all-digital PCS network covering much of its licensed population.[3]

Believing that it could turn a profit by serving underserved markets, Airadigm concentrated on providing service where it was needed most. The first cell sites that Airadigm activated were on the Oneida reservation, where none had been before. Airadigm now provides digital coverage throughout all of the Oneida tribal lands. More generally, Airadigm has at great cost sought to provide service to less-populated rural areas that traditionally have been underserved. Initially, Airadigm also concentrated much of its effort on an innovative landline replacement business model, bringing competition not only to wireless but also to traditional landline operators. Numerous small businesses and institutions now use Airadigm's wireless service as a partial or total replacement for traditional wireline telephony.

Airadigm's ambitious business plan required a massive investment in network equipment, however, and when subscriber revenues fell short of predictions it ran into

---

[2] *See* Public Notice, "Entrepreneurs' C Block Auction Closes," DA 96-716 (May 8, 1996).

[3] *See Requests for Extension of the Commission's Initial Non-Delinquency Period*, Order, 13 F.C.C.R. 22071 (1998) (statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani, dissenting in part).

financial difficulties. Thus, in July 1999, suffering heavy losses from operations, Airadigm sought "a breathing spell from [its] creditors," and a chance to "reorganize" its management team and business plan, H.R. Rep. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97 (purpose of 11 U.S.C. § 362(a)), and filed for protection under chapter 11 of the Bankruptcy Code.

After filing its chapter 11 petition, Airadigm secured additional debtor-in-possession financing and working capital loans. At the behest of the secured creditors, a "turn-around" specialist was hired, who reorganized or replaced much of Airadigm's management, trimmed its operating costs, increased its revenues, and re-focused its business model. The business turn-around seemed essentially complete in October 2000, when Airadigm confirmed a plan of reorganization that allowed Airadigm to emerge from bankruptcy with the help of two strategic investors, and to go forward (it hoped) as a viable business.[4]

However, a cloud has remained over Airadigm's affairs. In January 2000, two weeks after the FCC announced that NextWave's license had "automatically cancelled" and would be reauctioned,[5] the FCC informed Airadigm that it would take the position that Airadigm's licenses, too, had automatically cancelled. This pronouncement struck Airadigm like lightning from a clear sky. Although the FCC had filed a proof of claim and actively participated in Airadigm's bankruptcy, where Airadigm gained court authorization to pay its various current obligations, the FCC had never claimed that the quarterly interest payments on its own pre-petition debt should be among those obligations. And it never took any

---

[4] *In re Airadigm Communicators, Inc.*, Order Confirming Collective Plan of Reorganization for Airadigm Communications, Inc. as of Friday, October 13, 2000, No. 99-33500 (Bankr. W.D. Wis., Nov. 15, 2000).

[5] Public Notice, "Auction of C and F Block Broadband PCS License," DA 00-49 (Jan. 12, 2000).

action in the bankruptcy case, or in its own regulatory processes, to challenge Airadigm's open and continuing operations.

While reserving its rights to litigate, Airadigm in February 2000 petitioned the FCC for regulatory relief. The Communications Act and the FCC's own well-established policies dictate that the FCC should grant such relief as is necessary to preserve uninterrupted service to the public.[6] Airadigm asked the FCC to waive its automatic cancellation rules, or, if Airadigm's licenses had already cancelled, to reinstate them *nunc pro tunc*, to avoid cutting off service to tens of thousands of subscribers, including small businesses, governmental units, hospitals and other institutions, many of whom were in otherwise underserved rural areas and tribal lands.

The FCC has yet to act on Airadigm's petition. FCC officials are apparently paralyzed by the tenuousness of their litigation position against NextWave: One FCC official was quoted as stating candidly that his agency's "big fear" was that "an Airadigm decision could somewhat undermine our position in the NextWave case."[7] Thus, even though Airadigm developed and rapidly deployed "new technologies, products and services" particularly in "rural areas," made "efficient and intensive use" of its spectrum "without administrative or judicial delay," and introduced an "innovative" landline replacement service that provides "competition" to other wireless operators and the incumbent wireline carriers, *see* 47 U.S.C. § 309(j)(3), Airadigm's right to continue to operate the network it built hangs in limbo, pending this Court's consideration of the FCC's attempt to immunize itself from the plain and universal application of the Bankruptcy Code.

---

[6] *See, e.g., Second Thursday Corp.*, 22 F.C.C.2d 515, 515-16 (1990); *Liberty Cable Co.*, 11 F.C.C.R. 14133 (1996).

[7] Mary Greczyn, *Bankrupt Airadigm Awaits FCC Decision on C-Block Licenses*, Communications Daily, Vol. 21, No. 32 (Feb. 15, 2001).

SUMMARY OF ARGUMENT

To circumvent the plain mandate of the Bankruptcy Code, the government posits a conflict between that statute and the Communications Act. But there is no conflict. NextWave demonstrates in its brief that the unambiguous command of the Bankruptcy Code precludes the FCC's purported license cancellation. Airadigm demonstrates below that the Communications Act says nothing to the contrary.

The policy that the government seeks to enforce here—automatic cancellation of a debtor's licenses for its failure in bankruptcy timely to make a quarterly installment payment—is by no stretch required by the Communications Act. At best, that policy is a creature of regulation: a byproduct of the FCC's interpretation of its own rules implementing the Act. That fact alone disposes of the FCC's manufactured conflict-of-laws argument. The FCC cannot by rule except its operations from the express command of another federal statute.

Moreover, the government's policy is directly at odds with important provisions and purposes of the Communications Act that it purports to serve. Although section 309(j) authorizes the use of auctions, it does not permit the FCC to abdicate to the free market the decision of which allocation, among competing applicants, would best serve the public interest. On the contrary, Congress steered the FCC away from strict market-based allocations, directing the FCC instead to promote through its regulations a host of enumerated policy objectives. Among those are a preference for "new technologies," concern for residents of "rural areas," a desire to promote "economic opportunity" and the dissemination of licenses among a "wide variety of applicants," and particular solicitude for "small businesses, rural telephone companies, and businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3).

The government's narrow focus on the "integrity of the auction process" as a pure, market-based allocative

mechanism, and on automatic cancellation as a means of preventing "insincere" bidding, ignores and conflicts with these other stated ends of the Communications Act. By preventing an orderly reorganization under chapter 11, the automatic cancellation policy would work to the particular disadvantage of the inherently risky "small" and "innovative" operations that the Act requires the FCC to promote.

Nor is an automatic cancellation rule necessary to the narrow policy ends that the government proclaims. Nothing but the government's *ipse dixit* supports its insistence that a temporary suspension of installment payments at any time during the decade-long course of those payments will compromise the "integrity of the auction process." Indeed the FCC itself has recognized that bankruptcy and private workouts may be more efficient than and preferable to reclaiming and reauctioning licenses. Moreover there is no need to strain the law to protect the integrity of spectrum auctions: the bankruptcy process and the FCC's own rules contain ample safeguards against the sort of "gaming" that the FCC claims to fear. And if those are not enough, the FCC could have adopted other safeguards that do not run afoul of the Bankruptcy Code.

The facts and circumstances of Airadigm's case provide a real-life illustration of the absurdity of the FCC's purported policy rationale, for it is difficult to see what the FCC would gain by seizing and reauctioning Airadigm's licenses. It would terminate service to more than 30,000 mostly rural Americans, reduce competition, and destroy a small, rural telephone company owned in part by a minority group. For no good reason. Airadigm did not "game" the auction process, but went bankrupt because it forecasted wrong: about the cost of its innovative new technology, and how much people would be willing to pay for it. Finally, should the Court conclude that the FCC may cancel licenses for the untimely payment during bankruptcy of installment debt, Airadigm would also urge this Court to avoid any

intimation that might foreclose the FCC's ability to waive its cancellation policy in appropriate circumstances.

ARGUMENT

The government correctly states that, "where possible, one federal statute should not be interpreted in a manner that obstructs the functioning of another." FCC Br. 19; *see also* ASRC Br. 39. But that canon provides the government no support in this case. On the contrary, that principle compels affirmance. As the D.C. Circuit held, and as NextWave demonstrates conclusively, the text of Section 525 of the Bankruptcy Code unambiguously prohibits the FCC from canceling licenses solely because of the licensee's failure to make installment payments in bankruptcy. The FCC urges this Court to read the "policies" of the Communications Act to override the Bankruptcy Code and require "automatic cancellation" of PCS licenses whenever a bankrupt licensee fails to make a timely quarterly interest payment, in order to enforce discipline on a "market-based" allocation mechanism. As we demonstrate below, however, no provision of the Communications Act remotely *requires* that result, and the FCC's regulatory policy, even if otherwise valid, could not overcome the express mandate of the Bankruptcy Code. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (refusing to uphold agency interpretation that would interrupt statutory scheme). Moreover, the FCC's automatic cancellation policy is, in fact, at odds with the Communications Act it purportedly serves, ignoring relevant text and frustrating the achievement of core purposes of the Act.

I. THE COMMUNICATIONS ACT DOES NOT REQUIRE THE AUTOMATIC CANCELLATION OF LICENSES FOR UNTIMELY INSTALLMENT PAYMENTS IN BANKRUPTCY

The government argues that the Communications Act's specific "rules for license allocation" should take precedence

over any contrary mandate of the Bankruptcy Code. FCC Br. 20; *see also* ASRC Br. 39-44.[8] This argument suggests that the Communications Act requires the remedy of automatic cancellation of auctioned PCS licenses whenever a licensee operating under the protection of chapter 11 fails timely to make a quarterly installment payment to the FCC.[9] But the text of the Act leaves no doubt that this remedy for late payment is merely the FCC's interpretation of an FCC rule, not a requirement of the Communications Act. That is fatal to the government's case, for an otherwise valid agency rule is impermissible where Congress has provided to the contrary in another statute. *Brown & Williamson*, 529 U.S. at 137-38. Even if the policies that the FCC seeks to implement are otherwise valid and "important," it cannot "subordinate[]" to its interpretation of the Communications Act the "competing considerations underlying a Chapter 11 reorganization." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 525 (1984). Because the Communications Act in no way *requires* cancellation, the FCC cannot interpret its way out of the Bankruptcy Code's

---

[8] The government repeatedly—and incorrectly—attributes to the Act and to Congress the FCC's strict market allocation policies, stating variously that "Congress established a market-based system," FCC Br. 14, that "Congress adopted auctions ... because those entities that will use spectrum most productively will generally also be willing to pay the most for it," FCC Br. 19, that the D.C. Circuit decision would turn auctions "into the very sort of speculative venture that Congress sought to avoid," FCC Br. 26-27, and *passim*. Likewise the Auction #35 Petitioners erroneously spot a "blatant conflict" between the Bankruptcy Code and Communications Act, ASRC Br. 42, and incorrectly claim, for example, that Congress "placed [its] faith in market forces," ASRC Br. 40. Contrary to these characterizations, Congress did not adopt the market-based system that petitioners contend. *See* 16-18, below. Moreover, until the Act was amended in 1997 (after the C-Block auction is at issue here), the Act permitted, but did not require, the FCC to hold auctions. Pub. L. No. 105-33, § 3002(a), 111 Stat. 251, 258 (1997).

[9] The first eight quarterly installment payments are interest only; the remaining 32 are principal and interest. *See* 47 C.F.R. § 1.2110(g)(3).

command that it not "revoke...a license" for non-payment in bankruptcy of accrued interest on a pre-petition debt. *See* 11 U.S.C. § 525(a).

The government stakes its contrary argument principally on Section 309(j). This provision permitted the FCC to resolve mutually exclusive license applications through "competitive bidding." But amidst all of the specificity of Section 309(j), which dictates the circumstances in which competitive bidding may be used and the means by which the FCC's auction authority may be exercised, *see* (12)—(15), *infra*, no provision requires or authorizes automatic cancellation for untimely installment payments.

The government protests that the timely payment requirement and automatic cancellation somehow emanate from the general penumbra of auction authority conveyed in Section 309(j). *See generally* FCC Br. 22-25 (theorizing that timely payment is "critical" to "the integrity of the auction process"); *see also* ASRC Br. 41. But the government fails to identify even penumbral support for the notion that allocation by auction *requires* a resort to automatic cancellation of licenses for untimely payment in bankruptcy.

Indeed, the text of Section 309(j) could as easily support the opposite interpretation: that distressed licensees should be afforded an "automatic hiatus" of payments.[10] In fact, the FCC interpreted Section 309(i) to allow such an "automatic

---

[10] The FCC is authorized to "consider alternative payment schedules," 47 U.S.C. § 309(j)(4)(A), which could easily include various forms of relief to bankrupt or distressed licensees. And the explicit authorization of "royalty payments, or other schedules or methods," *id.*, implies by the principle of *ejusdem generis* that such "schedules or methods" might, like royalty payments, link the requirement of payments to the licensee's revenues and ability to pay. Such relief would be consistent with the ends the FCC is required to promote—for example avoiding the "administrative...delays" necessarily entailed in repossession and reauction, "promoting economic opportunity," and other of the Act's enumerated objectives. *See* 47 U.S.C. § 309(j)(3); *see also infra* at 14-15.

hiatus" of installments when it suspended all C-Block payment obligations for a seventeen-month period in 1997 and 1998.[11] It cannot now seriously contend that the same provision *prohibits* a payment hiatus and instead *requires* automatic cancellation for untimely payment.

The government also repeatedly incants the FCC's "exclusive authority" over licensing, FCC Br. 26, but this too is unavailing. *See also* ASRC Br. 39-40. Whatever licensing authority the FCC has is, to be sure, exclusive. But this exclusivity does not immunize the FCC's actions from the operation of other statutes of general application, such as the Administrative Procedure Act and the Bankruptcy Code. Indeed, dozens of federal agencies have exclusive authority over their respective bailiwicks, yet they too must take their lumps in bankruptcy. *See generally, e.g., Bildisco*, 465 U.S. 513 (collective bargaining agreement rejected in bankruptcy, notwithstanding NLRB attempt to preserve it). The FCC's exclusive licensing authority does not authorize (much less require) it to cancel bankrupt debtors' licenses for untimely installment payments in violation of Section 525 of the Code.

Finally, the government points to the general savings provision of Section 309(j)(6)(C), which provides that nothing in "this subsection"—Section 309(j)—or "in the use of competitive bidding" shall "diminish the authority of the Commission under the other provisions of this Act to regulate or reclaim spectrum licenses." *E.g.*, FCC Br. 47-48. Yet by its terms that provision saves only the FCC's authority to "regulate or reclaim" licenses in accordance

[11] *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Servs. (PCS) Licensees*, Order on Reconsideration of the Second Report and Order, WT Dkt. No. 97-82, at ¶¶ 3-4 (Mar. 24, 1998) (hereinafter, "*Order on Reconsideration*") (payment suspension period beginning March 31, 1997 and ending March 31, 1998); *see also, e.g.*, Public Notice, "U.S. Department of Justice Approves Debt Forgiveness," DA 98-1051 (June 3, 1998) (approving debt forgiveness aspects of *Order on Reconsideration*).

with "other provisions" of the Act *outside* Section 309(j) insofar as those "other provisions" might be diminished by exercise of the authority provided *inside* Section 309(j). 47 U.S.C. § 309(j)(6). Nothing in this savings clause empowers the FCC *inside* Section 309(j) to "reclaim" licenses where no provision *outside* Section 309(j) and the auction scheme provided therein would otherwise give rise to license reclamation. The savings clause of Section 309(j)(6)(C) itself conveys no affirmative authority, much less any authorization to cancel or "reclaim" licenses in circumstances where that is forbidden by the Bankruptcy Code. *See also, e.g., United States v. Locke*, 529 U.S. 89, 105 (2000) ("evident purpose" of savings clause is to preserve existing law, "rather than impose substantive regulation").

In light of the unambiguous mandate of Section 525 of the Bankruptcy Code, the absence from the Communications Act of any express *requirement* that licenses automatically cancel for nonpayment in bankruptcy is fatal to the government's case. Even if the Communications Act could otherwise be interpreted to allow the FCC to promulgate and enforce a substantive rule of automatic cancellation, the contrary command of the Bankruptcy Code would block that path. A regulation that "operates to create a rule out of harmony with the statute, is a mere nullity." *United States v. Larionoff*, 431 U.S. 864, 873 n.12 (1977) (citation omitted); *see also, e.g., Bildisco*, 465 U.S. at 529 n.9 (agency interpretation constrained by Bankruptcy Code). The government stands the principle of statutory harmonization on its head when it insists that the unambiguous dictates of the Bankruptcy Code should give way to the FCC's regulatory efforts to enforce the "integrity" of auctions as strict, market-based allocation mechanisms.

II. AUTOMATIC CANCELLATION OF LICENSES FOR UNTIMELY PAYMENT FINDS LITTLE SUPPORT IN THE PROVISIONS AND PURPOSES OF THE COMMUNICATIONS ACT.

Even if the FCC could somehow leverage a valid regulatory interpretation of the Communications Act to avoid the plain application of the Bankruptcy Code, there is little support in the Communications Act for the automatic cancellation of PCS licenses for late payments in bankruptcy. The government is on shaky ground contending that the Communications Act permits use of auctions as strict, market-based allocation mechanisms. Indeed, the Act's allocative policies are directly at odds with the FCC's policy that PCS licenses are automatically revoked whenever a bankrupt licensee fails for any reason to make a payment on time. Having ignored crucial provisions of the Act in its single-minded pursuit of market-based allocations, the FCC cannot now look to the Communications Act to shield its actions from the Bankruptcy Code.

A. Automatic Cancellation Conflicts With The Purposes Of The Communications Act.

Although Section 309(j) of the Communications Act authorizes the FCC to allocate licenses by competitive bidding, it tightly restricts the circumstances under which competitive bidding may be used, *e.g.*, 47 U.S.C. §§ 309(j)(2), 765f, and the means by which the auction authority may be exercised. Most saliently, using "the language of command," *Alabama v. Bozemon*, 533 U.S. 146, 153 (2001) (citation omitted), Congress specified that the FCC "shall seek to promote" certain enumerated policy objectives. 47 U.S.C. § 309(j)(3). Among other things, these objectives state a preference for "new technologies," concern for residents of "rural areas," a desire to promote "economic opportunity" and the dissemination of licenses among a "wide variety of applicants," and particular solicitude for "small businesses, rural telephone companies, and businesses owned by

members of minority groups and women." 47 U.S.C. § 309(j)(3).

Likewise in "prescribing regulations" to carry out these objectives, Congress did not allow the FCC merely to trust market forces to optimize the manner and level of service provided or to achieve the enumerated policy objectives. The Communications Act directs that the FCC "shall" include "performance requirements" to benefit "rural areas" and prevent spectrum "stockpiling." 47 U.S.C. § 309(j)(4)(B). The licensing scheme must promote a geographically "equitable distribution" of licenses even where the market might produce an inequitable (though perhaps economically efficient) result. 47 U.S.C. § 309(j)(4)(C). And while free transferability will tend to assign assets to their highest value use, the FCC must constrain the market with "antitrafficking" and other rules necessary to "prevent unjust enrichment." 47 U.S.C. § 309(j)(4)(E). Thus, the statute trusts market-based allocations only up to a point, and requires the FCC in some circumstances to allocate licenses where the market might not.

At the same time, the FCC is directed to recover for the public fisc "a *portion* of the value" of the spectrum, 47 U.S.C. § 309(j)(3)(C) (emphasis added), but not necessarily its full value. If Congress had intended, as the government suggests, to allocate licenses to those "willing to pay the most" for them, FCC Br. 19, it might have avoided such surplussage. The statute thus treats the sale of spectrum licenses with some suspicion, de-emphasizing the importance of payments, as such, in the allocative scheme.

Further, although the market might allocate licenses overwhelmingly to large incumbents, the Act provides that the FCC must "ensure" that small businesses "are given the opportunity" to provide wireless services. 47 U.S.C. § 309(j)(4)(D). Whereas the market might produce a natural monopoly, the FCC must "promot[e]...competition" and "disseminat[e] licenses among a wide variety of applicants." 47 U.S.C. § 309(j)(3)(B). And while the highest and best use

might be to "warehouse" or "stockpile" spectrum for future technologies or spectrum requirements, the FCC is required to "prevent" those ends. 47 U.S.C. § 309(j)(4)(B).

In sum, the detailed specifications of Section 309(j) hardly reflect a "'classical belief in the efficacy [of] market forces.'" FCC Br. 23 (quoting Pet. App. 229(a) (alteration in original)). Far from leaving the FCC free simply to rely on Adam Smith's "invisible hand" to allocate licenses, the Act requires the FCC to intervene in the market—to manage who receives a public spectrum license and the use to which it is put. The government seriously oversimplifies and misconstrues the terms of its competitive bidding mandate when it seeks to enshrine "an entity's willingness and ability to pay the most for the license" as the sole or "paramount" indicia of the "public interest," *see* FCC Br. 15, 25; *see also* ASRC Br. 40, and on that basis to argue that the proper "functioning" of the Communications Act requires automatic cancellation for untimely payment.

In fact the opposite is true. The FCC's authorization to "consider alternative payment schedules," including "installment payments," specifies that any such method must "promote the objectives described in paragraph (3)(B)." 47 U.S.C. § 309(j)(4)(A). As noted, those objectives include "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3)(B). Automatic cancellation of licenses for untimely payment is directly at odds with those objectives. By canceling Airadigm's licenses, for example, this policy would reduce "competition," deny 30,000 Americans access to the "new and innovative technolog[y]" they have chosen to purchase, and at once destroy a "small business[]," a "rural telephone compan[y]," and a business "owned by [a] minority group[]" of Native Americans. *See* 47 U.S.C.

§ 309(j)(3)(B). The penalty of automatic cancellation thus tramples core policies specified by the Communications Act.

These results, moreover, are entirely foreseeable. Small, thinly capitalized businesses like Airadigm will always lack the financial cushion enjoyed by large incumbent operators such as Petitioner and re-auction winner VoiceStream Wireless; they will always be one step closer to insolvency, bankruptcy, and untimely payments. Likewise, innovative and untested ventures (such as Airadigm's landline replacement strategy) will always carry more risk than more traditional business models; they will always be more prone to untimely payments.

Moreover, the FCC's policy of automatic cancellation for untimely payment by Chapter 11 debtors, if announced and known at the time of the auction, would have tended by its mere presence to harm small businesses and to discourage innovation. Investors, particularly commercial lenders, would have refused to back any but the most stable and well-established concerns, for they would lose any hope of recovery if the business turned sour. Indeed the FCC has long recognized such "'equitable considerations in favor of innocent creditors'" in its *Second Thursday* doctrine, which allows a licensee facing revocation instead to sell its license, so long as the proceeds flow primarily to its creditors.[12] Automatic cancellation for untimely payment in bankruptcy would dramatically increase the risk and consequences of small-business failure and thereby raise the cost of capital to licensees, channeling investment instead towards less innovative, less entrepreneurial, and therefore less risky business models.

There is thus little support in the Communications Act for automatic cancellation of spectrum licenses for untimely payment in bankruptcy. By its terms, and particularly as

---

[12] *See. e.g., MobileMedia Corp.*, Memorandum Opinion and Order, 14 F.C.C.R. 8017, at ¶ 4 (1999) (quoting *Second Thursday Corp.*, 22 F.C.C.2d 515, at ¶ 5 (1970)).

illustrated by its application to small and innovative businesses such as Airadigm, that policy would not "promote" but would instead harm the objectives set forth in Section 309(j)(3)(B).

B. The FCC's Paramount Focus On Strict Market-Based Allocation Is A Path Rejected By Congress.

As early as 1986, the FCC asked Congress for authority to auction licenses, rather than use comparative hearings or lotteries.[13] The FCC complained that the comparative hearing process "can go on and on for years" and consume "millions of dollars in litigation fees to get the service out."[14] Even at the conclusion of that "very long and very tedious" process, the fine and often pointless distinctions among applicants left the FCC "not at all sure that they have chosen the best licensee at the end of the day."[15] The FCC also expressed dissatisfaction with the lottery process, which, in its view, spawned a "lottery frenzy" with thousands of applications churned out by "application mills," leaving the FCC to the "laborious task" of processing those

---

[13] *See, e.g., Spectrum Auctions: FCC Proposals for the Airwaves: Hearing before the Subcomm. on Telecom., Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong. 1 (1986) (hereinafter, "*Spectrum Auctions*") (statement of Subcomm. Chairman Wirth discussing spectrum auction proposal).

[14] *Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1988: Hearings before a Subcomm. of the Senate Comm. on Appropriations on H.R. 2763*, 100th Cong. 14 (1987) (hereinafter, "*H.R. 2763 Hearing*") (testimony of Mark Fowler, Chairman of the FCC).

[15] *FCC Reauthorization: Hearing before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 102d Cong. 21 (1991) (testimony of Hon. Alfred Sikes, Chairman of the FCC); *see also H.R. 2763 Hearing*, 100th Cong. 26 (written response of Mark Fowler, Chairman of the FCC to questions submitted by Senator Hollings) (it is "unclear whether [comparative hearings] provide the type of information that enables the Commission to choose the applicants that will best serve the public").

thousands of applications, determining their threshold qualifications, and choosing among them.[16] And even then, the FCC noted, license lotteries often led to litigation and "literally years of administrative delay."[17]

Yet Congress nonetheless balked at granting the FCC auction authority. Indeed, legislation was introduced to expressly ban the use of auctions to allocate spectrum licenses.[18] In explaining his opposition to an earlier auction proposal, Telecommunications Subcommittee Chairman Wirth said, "[t]he public will not be served by allowing only larger, wealthier companies to obtain communications licenses at the expense of smaller companies, including minority-owned businesses...."[19] Likewise, although a proposed "Auction Licensing Act of 1987" was projected to yield a $600 million windfall for the budget,[20] it was rejected by Congress and sparked a tongue-lashing of Chairman Fowler by Senator Rudman: "Congress isn't going to go along with your auction," he stated, because "it will aid monopolies. You won't get anywhere with this, so why don't you go back to the drawing board?"[21]

---

[16] *FCC Reauthorization: Hearing before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 102d Cong. 21 (1991) (testimony of Hon. Alfred Sikes, Chairman of the FCC).

[17] *Emerging Telecommunications Technologies: Hearings before the Subcomm. on Telecomm. and Finance of the House Comm. on Energy and Commerce on H.R. 2965*, 101st Cong. 28 (1990) (hereinafter, "*H.R. 2965 Hearing*") (statement of Alfred Sikes, Chairman of the FCC).

[18] *See, e.g., H.R. 2965 Hearing*, 101st Cong. 3 (statement of Hon. Don Ritter discussing auction ban in H.R. 2965).

[19] *Spectrum Auctions*, 99th Cong. 2 (statement of Subcomm. Chairman Wirth).

[20] *H.R. 2763 Hearing*, 100th Cong. 5 (statement of Mark Fowler, Chairman of the FCC)

[21] *H.R. 2763 Hearing*, 100th Cong. 14.

It was not until the budget act for fiscal year 1993 that Congress granted auction authority to the FCC. But even then, this was not the free-market deregulatory authority that the FCC had requested. Opponents of pure, market-driven auctions had argued strenuously that competitive bidding would "violate the notion that the airwaves are owned by the public and should be regulated for its benefit...instead of selling spectrum rights to the rich."[22] The Conference Report thus recognized the "concern[] that, unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries."[23] Ultimately Congress forged a compromise.[24] In the 1993 Budget Act Congress authorized auctions to recover a "portion" of the spectrum value, while requiring the FCC affirmatively to protect against market forces the various interests Congress found important.

There is little support in the legislative history, moreover, for the government's contention that Congress authorized auctions with a view that market-based competitive bidding had special allocative significance. That line of reasoning is largely a *post hoc* invention. Rather, the structure, text and history of Section 309(j) indicate that Congress authorized the use of auctions principally to raise money for the treasury. The legislation was entitled the "Omnibus *Budget* Reconciliation Act of 1993," Pub. L. No. 103-66, 107 Stat. 312 (1993) (emphasis added), and the rest of the statute makes plain that it was, in general, intended to provide additional funding to reconcile the budget. For example, in this Act, Congress for the first time began charging user fees at certain National Parks, Pub. L. No.

---

[22] 139 Cong. Rec. 2348 (1993) (statement of Sen. Inouye).

[23] H.R. Rep. No. 103-111, at 254 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 581.

[24] *See H.R. 2763 Hearing*, 100th Cong. 15.

103-66, § 10001, 107 Stat. at 402, and levied a ten cent per hundred weight fee on imported tea, *id.* § 4401, 107 Stat. at 378. *See, e.g., Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (clause interpreted "in connection with...the whole statute...and the objects and policy of the law, as indicated by its various provisions") (citation omitted). Like beverage duties and park user fees, the 1993 Act authorized spectrum auctions as a source of federal revenue, but required the FCC at the same time to ensure that licenses were allocated in the public interest.

In sum, automatic cancellation cannot be defended as a concomitant of Congressional intent to adopt a deregulatory system that relies purely on market forces to allocate licenses.[25] Congress considered and refused to follow precisely that approach. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted).

C. Automatic Cancellation Is Unnecessary To Promote Allocative Efficiency.

Even if (contrary to its plain terms) the Communications Act left the FCC free to abdicate its licensing authority to the "invisible hand," and thus to use its auction authority to award licenses solely to whoever could pay the most for them, automatic cancellation for untimely payment of periodic interest in bankruptcy cannot be defended as necessary to allocative efficiency.

1. Installment Payments Lack The Significance Of Down Payments.

The government repeatedly quotes the D.C. Circuit's conclusion in another case that the FCC's payment rules "'provide an "early warning" that a winning bidder unable to

---

[25] "[T]he wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public.'" FCC Br. 25 (quoting *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 518 (D.C. Cir. 1999)).[26] But by its terms that conclusion related only to the five percent *down payment* that was at issue in *Mountain Solutions*, not to the subsequent quarterly installment payments at issue here. The FCC had emphasized in *Mountain Solutions* that the second down payment was "the last payment that is required before the Commission grants the license and proceeds with installment payments under a note and a security agreement. It is important that financial viability be clearly demonstrated before we grant the license because the Commission runs the risk of bankruptcy tying up the license."[27] The strict down payment requirement was viewed as a means to "discourag[e] insincere or financially unqualified bidders from 'shopping' a winning bid in order to obtain financing for a down payment."[28] Thus, the FCC had determined that by failing to make its down payment "Mountain Solutions has failed to demonstrate its financial viability," and its fitness as a licensee.[29] The D.C. Circuit found that while the FCC might have concluded otherwise, the agency did not "abuse[] its discretion." *Mountain Solutions*, 197 F.3d at 521-22.

---

[26] Likewise the government cites to the FCC's decisions in *Southern Communications Sys., Inc.*, Order, 12 F.C.C.R. 1532 (WTB 1997), and *Longstreet Communications Int'l, Inc.*, Order, 12 F.C.C.R. 1549 (WTB 1997), both of which, like *Mountain Solutions*, dealt with down payments, not installment payments. FCC Br. 25.

[27] *Mountain Solutions Ltd.*, Memorandum Opinion and Order, 13 F.C.C.R. 21983, at ¶¶ 18 (1998). Plainly, if licenses could be "tied up" in bankruptcy the FCC in 1998 had not yet taken the view that nonpayment in bankruptcy would lead to automatic cancellation.

[28] *Longstreet Communications Int'l, Inc.*, Order, 12 F.C.C.R. 1549, at ¶ 6 (WTB 1997).

[29] *Mountain Solutions*, 13 F.C.C.R. 21983, at ¶¶ 14-17.

Unlike the missed down payment at issue in *Mountain Solutions*, untimely installment payments do not necessarily provide an "early warning" of a licensee's financial viability. Indeed, installment payments stretch out for *ten years*—the entire term of the license. *See* 47 C.F.R. §§ 1.2110(g)(3)(ii), 24.15. For example, Airadigm did not file for bankruptcy and cease making installment payments until three years after it submitted its winning bids, almost a third of the way through its full license term. Airadigm's missed installment payments cast no doubt on its "capability to actually build out its system." *Mountain Solutions*, 13 F.C.C.R. 21983, at ¶ 18. Airadigm built out a top-quality, all-digital PCS system nearly five years ago, and it now provides service to more than 30,000 subscribers. Even after Airadigm filed for bankruptcy protection and began missing payments it continued and completed portions of its buildout, improving and expanding its service to the public. In hindsight, Airadigm's plan to rapidly deploy new and innovative services may have been *too* ambitious, for it ultimately led to unsustainable losses from operations. But while Airadigm's creditors and equity holders paid the price for their ambition and landed in bankruptcy, still the public has enjoyed the benefits of Airadigm's wireless system, and has continued to enjoy those benefits throughout Airadigm's bankruptcy.

2. Timely Payment Lacks The Significance Of Full Payment.

The FCC's basic policy argument is that a bidder in one of its auctions might be tempted to "insincere" bidding if it knows *ex ante* that it can escape its obligations, should it come to regret its bid. *E.g.*, FCC Br. 24. Such a regime, the government says, would permit speculators to bid more than their expected value for the spectrum on the chance that its value might increase, and would thus impair the ability of the auction to allocate licenses to their highest-value users. *Id.*

As an initial matter, this reasoning is too facile—particularly in its assumptions that bidders have perfect

foreknowledge and that there exists some Platonic truth as to who is the highest value user. In fact, bidders make a series of educated guesses as to how much it will cost to build and operate a system, what their future cost of capital will be, how many subscribers they will attract and retain, and how much revenue each subscriber will generate, and then wrap those guesses together into an overall guess as to how much they can afford to pay for the spectrum. And like Airadigm's, some of those guesses may prove wrong.

Likewise, the "value" of the spectrum will always include its potential value to another user. A bidder may rationally value a license according to the net present value of the income stream to be generated by its own use of that license. Or it might just as rationally value the license according to the price another user would pay for the license—a price in turn dictated by the income stream the license represents to that other user. So a bidder must predict not only the income stream it might generate, but also the income stream some other user might generate and thereby the potential value of its own exit strategy. Against this backdrop of uncertainty, it is unreasonable to brand as "insincere" and punish with cancellation those whose predictions later proved flawed.

More fundamentally, the FCC's allocative efficiency argument only goes to a situation where the bidder may escape "'the obligation to make good *the amount* bid.'" FCC Br. 24 (quoting Pet. App. 246a) (emphasis altered). According to the FCC's theory, it is necessary to hold bidders to their bid amounts in order to discourage speculation. It may be one thing to argue that *full* payment of the amount bid is necessary to preserve the "integrity of the auction process." But that issue is not before this Court. *E.g.*, FCC Br. (I). Airadigm has never challenged the amount due to the FCC, and both Airadigm and NextWave have repeatedly sought to make full payment to the FCC. Nowhere in the government's brief or anywhere else—*including in the original rulemaking proceeding or the regulatory Order from which this appeal stems*—is there

any explanation of how the FCC's argument extends to the *time* an installment payment is made.

A bidder's recognition at the time of the auction that it could take the "breathing spell" provided by chapter 11 of the Bankruptcy Code, and thereby delay some of its quarterly payments for a limited period of time (the average chapter 11 bankruptcy takes 13 months),[30] would likely have no effect on its valuation of the licenses or on the amount of its bid. Certainly the ability to delay payments under chapter 11 does not create the "put option" that the government describes as "heads-I-win, tails-you-lose." FCC Br. 26. Particularly given the haircut normally taken by equity holders and frequent wholesale replacement of senior management in bankruptcy, there is little reason to suppose that the availability of a payment hiatus would encourage "insincere" bidding or otherwise affect the amount of any bid.

In light of the time value of money, one *could* argue that the ability to delay payments is of value, and that to permit such delay would effectively reduce the amount of the winning bid. Yet the FCC has never made this argument, in its briefs or in its own regulatory proceedings. And in any case the quantum of any such time value would be tiny—perhaps one third of one percent of the bid amount—and immaterial to the value of the license.[31] There is simply no evidence that anticipation of the potential for bankruptcy

---

[30] Margaret Graham Tebo, *A New Chapter*, 87 A.B.A.J. 46 (July 2001).

[31] Because the installment payments delayed by NextWave and Airadigm were interest-only, the time value of these would in effect be the interest on the interest, deferred over the course of an average year-long bankruptcy. *See* Tebo, *A New Chapter*, 87 A.B.A.J. 46 (average bankruptcy 13 months in length). Thus, the first missed quarterly payment would be deferred for a year, while the last missed quarterly payment would be deferred only for a quarter. At a 7.5 percent nominal rate for the FCC debt, this would produce a time value of the deferred payments equal to approximately one third of one percent of the debt amount.

relief from the timely payment requirement would have any impact on bidding strategy.

Any notion that payment delay in this sense is equivalent to payment reduction is belied by the FCC's own C-Block Restructuring Order. In March 1997, in response to several petitions from distressed C-Block licensees, the FCC decreed a temporary suspension of all installment payments.[32] This hiatus apparently did not undermine the "integrity of the auction process." On the contrary, the FCC drew a clear distinction between payment deferral, which did not "result in a reduction of the current nominal debt owed," on the one hand, and debt "forgiveness" on the other.[33] While it implemented a seventeen-month payment deferral, it refused to provide debt "forgiveness."[34] Thus, the FCC itself recognized the important difference between payment *delay* and payment *reduction* in its C-Block restructuring orders.

D. Automatic Cancellation Would Not Advance The Communications Act's Goal Of Minimizing Transaction Costs.

Automatic cancellation for untimely payment in bankruptcy is not necessary to effectuate Congress's goal of rapid deployment of services "'without administrative or judicial delays.'" *See* FCC Br. 25, 49 (quoting 47 U.S.C. § 309(j)(3)(A)); *see also* ASRC Br. 41-42. To the contrary, because this bright-line rule is profoundly overinclusive, it would cause many more administrative and judicial delays than it would remedy. The FCC itself has recognized that "reclaiming and reauctioning licenses" can "engender"

---

[32] *Installment Payments for PCS Licenses*, Order, 12 F.C.C.R. 17325 (WTB 1997).

[33] *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Servs. (PCS) Licensees*, Second Report and Order and Further Notice of Proposed Rulemaking, 12 F.C.C.R. 16436, at ¶¶ 18-19 (1997).

[34] *Id.*

unfortunate side effects, including "investor and/or service disruption[s]."[35] For example, the FCC's automatic cancellation policy has seriously undermined Airadigm's ability to continue building out its licensed areas, as it has prevented Airadigm from fully consummating its Plan and receiving the influx of capital provided thereby.[36] Moreover, the FCC has recognized the particular capabilities of auctions conducted under bankruptcy court supervision—stating that an applicant's "high bid" in one such bankruptcy auction ensures that the "transaction will shift these assets toward their highest valued use."[37] Thus, a disposition in bankruptcy accomplishes the same allocative goal that the FCC's rules claim to pursue. Automatic cancellation and reauction would often prove less efficient, and cause more delay, than reorganization under chapter 11.

E. Protections Less Draconian Than Automatic Cancellation Are Sufficient To Ensure The Integrity Of Auctions.

Even if the FCC needed to guard against bidders who might somehow game the auction process by using the temporary "breathing spell" provided by chapter 11, automatic cancellation for untimely payments in bankruptcy is akin to killing a gnat with a shotgun. License cancellation is a "death penalty" for FCC licensees that "should not be considered or undertaken lightly."[38] Carriers must invest

---

[35] *Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, 11 F.C.C.R. 7824, at ¶ 85 (1996).

[36] *Cf. In re Airadigm Communicators, Inc.*, Order Confirming Collective Plan of Reorganization for Airadigm Communications, Inc. as of Friday, October 13, 2000, No. 99-33500 (Bankr. W.D. Wis., Nov. 15, 2000).

[37] *Geotek Communications, Inc., Debtor-In-Possession*, Memorandum Opinion and Order, 15 F.C.C.R. 790, at ¶ 44 (WTB 2000).

[38] *Petition for Declaratory Ruling Concerning the Requirement of Good Faith Negotiations*, Memorandum Opinion and Order, PR Dkt. No. 93-144, at ¶ 5 (WTB rel. Mar. 2, 2001).

vast amounts of money to build a network and a business. For example, Airadigm's capital expenditures and net investment in operations are more than triple the amount of its FCC debt.[39] Yet that entire investment becomes essentially worthless without the FCC license upon which it all depends. Mechanisms short of the cancellation "death penalty" are sufficient to dissuade licensees from gaming the auction.

Foremost among these mechanisms are those provided by bankruptcy law itself. At the outset, a chapter 11 filing may be subject to dismissal if made under the circumstances the FCC fears: Section 1112(b), which allows dismissal or conversion under various circumstances, including the absence of a "reasonable likelihood of rehabilitation," 11 U.S.C. § 1112(b), provides "a powerful tool to weed out inappropriate chapter 11 cases at the earliest possible stage." 7 *Collier on Bankruptcy* ¶ 1112.04[2] (Alan N. Resnick et al. eds., 15th ed. rev. 2002). In addition to this statutory remedy, more than a century of judicial interpretation allows courts to dismiss a chapter 11 case for "lack of good faith." 7 *Collier* ¶ 1112.07; *see also, e.g., Dunes Hotel Assocs. v. Hyatt Corp.*, 245 B.R. 492, 511-12 (D.S.C. 2000) (affirming dismissal where solvent debtor filed case to avoid unfavorable lease terms). Nor will bankruptcy courts allow the use of chapter 11 to "frustrate the rights of creditors (particularly with respect to single asset cases)." 7 *Collier* ¶ 1112.07[2]; *see also In re Bowman*, 181 B.R. 836, 846 (Bankr. D. Md. 1995) (dismissal when "the debtor files for the purpose to 'hold a single asset hostage in order to speculate that such asset may increase in value in order to recover its original value at the creditor's risk'" (citation omitted)). The sort of gamesmanship and abuse of chapter 11 that the FCC seems to fear would likely find a cold reception in bankruptcy court.

[39] *See Airadigm Communications, Inc.*, Petition for Reinstatement, DA 00-68 at 5 (filed Feb. 7, 2000).

Moreover, the specter of bankruptcy itself is likely to dissuade disingenuous bidding. Even in the best of circumstances, chapter 11 is not a particularly attractive process. The absolute priority rule puts equity at substantial risk of recovering nothing until debt is repaid in full. Quite often the equity is completely wiped out. Additionally, in most situations, such as Airadigm's, senior management is replaced. The debtor may lose control over its own business affairs. There is no reason to believe that any individual or entity would deliberately set out on a course that it believed likely to end in bankruptcy, or that any outside investor would provide money to fund such a venture.

In addition, the FCC's rules provide other strong disincentives against default. Defaulting bidders are barred from participation in auctions, 47 C.F.R. § 1.2105(a)(2)(x), and any affiliate of any entity that has ever been in default must pay a substantial premium to participate in future auctions, 47 C.F.R. § 1.2106(a). The severity of these penalties cannot be underestimated, as carriers are constantly looking for additional spectrum, and typically participate in each successive auction. Likewise, defaulting bidders may be subject to substantial financial penalties. *See* 47 C.F.R. § 1.2109.

Finally, instead of becoming a creditor, the FCC could have structured its payment obligations differently, to avoid conflict with the Bankruptcy Code. The FCC auctioned ten-year licenses and financed 90 percent of the purchase price with ten-year notes requiring periodic payments. The Commission instead might have auctioned off one-year licenses, automatically renewable for up to nine further one-year terms upon receipt of specified payments.[40] The difference between pre-petition debt and current payment

[40] Because of this important distinction, there is little basis to fear the slippery slope predicted by the government—that the D.C. Circuit's decision would subject to "revision and renegotiation in bankruptcy" even a state drivers' license fee. FCC Br. 28 n.9.

obligations carries profound significance in bankruptcy. If the FCC failed to heed the Bankruptcy Code when structuring its payment options, it cannot now hide behind the Communications Act to escape the consequences of that failure.

Nowhere has the FCC explained why its existing rules, or those of the Bankruptcy Code, are inadequate to prevent the "insincere bidding" that it so fears (and so vaguely defines). The D.C. Circuit's opinion points out some further alternatives: credit checks, third party guarantees, or other schemes. *See NextWave Personal Communications, Inc. v. FCC*, 254 F.3d 130, 155 (D.C. Cir. 2001).[41] The notion that automatic cancellation is necessary to the efficient functioning of FCC auctions is baseless.

III. IN ANY EVENT, THE FCC SHOULD RETAIN AUTHORITY TO WAIVE ITS CANCELLATION RULE OR REINSTATE LICENSES

The FCC has discretion to waive any of its rules. 47 C.F.R. § 1.925. Such fact-specific waivers are necessary to proper application of the substantive and procedural mandates of the Communications Act, 47 U.S.C. § 309, and the Administrative Procedure Act, 5 U.S.C. § 706. "The agency's discretion to proceed in difficult areas though general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). While the FCC may establish rules of general application, it retains "an obligation to seek out the 'public interest' in particular, individualized cases." *Id.*

The government's brief is somewhat troubling in this regard, to the extent it suggests that automatic cancellation for untimely payment in bankruptcy is directly mandated by the Communications Act. *See, e.g.*, FCC Br. 20 (suggesting

[41] There is no support for the government's assertion, FCC Br. 50, that these would necessarily entail subjective inquiries.

that cancellation for "failure to make timely payment" is part of "the auction regime Congress established in Section 309(j)"); *see also* ASRC Br. 39. As demonstrated above, that suggestion is simply incorrect: the automatic cancellation policy is an FCC interpretation of its own regulation, not a command of the statute. Because automatic cancellation is not required by the Communications Act, such cancellation can be waived. The FCC has itself recognized this by waiving its down payment rules[42] and its installment payment rules[43] when it has concluded that doing so was in the public interest.

There is little question that waiver in the cited cases, and in Airadigm's case here, is in the public interest. If Airadigm is forced to cease operations, more than 30,000 Americans will lose their wireless service; many small businesses and institutions will lose their primary phone service; millions of dollars of consumer and business investment will be lost; the marketplace will lose a competitor; employees will be put out of work; and a tribe of Native Americans will lose service to their reservation, and also the value of their multi-million dollar investment. Thus, even were this Court persuaded that the FCC has the power to cancel PCS licenses for a bankrupt licensee's untimely payment of quarterly interest, it should take care not to constrain the FCC's discretion to waive that policy under appropriate circumstances.

[42] *See AMK Int'l, Inc.*, 12 F.C.C.R. 1511 (WTB 1997); *Cenkan Towers, L.L.C.*, 12 F.C.C.R. 1516 (WTB 1997); *Hickory Tel. Co.*, 12 F.C.C.R. 1528 (WTB 1997); *The Wireless, Inc.*, 12 F.C.C.R. 1821 (WTB 1997); *Roberts-Roberts & Assocs., L.L.C.*, 12 F.C.C.R. 1825 (WTB 1997); *RFW, Inc.*, 12 F.C.C.R. 1536 (WTB 1997); *MFRI, Inc.*, 12 F.C.C.R. 1540 (WTB 1997); *CSS Communications, Co.*, 12 F.C.C.R. 1507 (WTB 1997); *Longstreet Communications Int'l, Inc.*, 12 F.C.C.R. 1549 (WTB 1997).

[43] *See Lakeland PCS LLC*, Second Order on Reconsideration, 15 F.C.C.R. 23733 (WTB 2000).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

RICHARD P. BRESS
Counsel of Record
JAMES F. ROGERS
WILLIAM S. CARNELL

LATHAM & WATKINS
555 Eleventh Street, N.W.
Washington, D.C. 20004
202-637-2200
Counsel for Amicus Curiae

Nos. 01-653, 01-657

JUN 21 2002

IN THE

Supreme Court of the United States

RECEIVED
JUN 27 2002
937967
LDC

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS, INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORPORATION, *et al.*,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR AMICI CURIAE SENATORS PATRICK LEAHY, ORRIN HATCH, ROBERT TORRICELLI AND CHARLES SCHUMER, REPRESENTATIVES JOHN CONYERS, LINDSEY GRAHAM AND JERROLD NADLER, AND THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES IN SUPPORT OF RESPONDENTS

WALTER DELLINGER
(*Counsel of Record*)
JONATHAN D. HACKER
JEREMY MALTBY
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Attorneys for Amici Curiae

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Court of Appeals correctly held that the plain language of § 525(a) of the Bankruptcy Code, 11 U.S.C. § 525(a), precluded the Federal Communications Commission from revoking licenses held by a debtor in bankruptcy solely because such debtor did not make installment payments after filing for bankruptcy.

TABLE OF CONTENTS

INTERESTS OF AMICI 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

A. The Bankruptcy Code Reflects Congress's Balancing Of Numerous Policy Concerns, To Which This Court's Natural Meaning Interpretive Approach Properly Defers 7

B. Congress Has Considered And Rejected FCC Proposals To Exempt Spectrum Licenses From Bankruptcy Code § 525 14

C. The Natural Meaning Of Bankruptcy Code § 525 Accurately Reflects Congress's Intention To Afford FCC Licensees And Their Creditors The Standard Protections Of The Code 21

CONCLUSION 30

TABLE OF AUTHORITIES

CASES **Page(s)**

Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999) 7,16

Butner v. United States, 440 U.S. 48 (1979) 9

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 11

Cooke v. United States, 91 U.S. 389 (1875) 11

Dallas-Fort Worth Reg'l Airport Bd. v. Braniff Airways, 26 B.R. 628 (Bankr. N.D. Tex. 1982) 9

Davis v. Pringle, 268 U.S. 315 (1924) 11

Duffey v. Dollison, 734 F.2d 265 (6th Cir. 1984) 28

In the Matter of Bradley, 989 F.2d 802 (5th Cir. 1993) 28

In re Colon, 102 B.R. 421 (Bankr. E.D. Pa. 1989) 29

Franconia Assocs. v. United States, No. 01-455 (June 10, 2002) 11

Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U.S. 152 (1912) 11

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000) 8

Hillis Motors, Inc. v. Hawaii Auto Dealers' Ass'n, 997 F.2d 581 (9th Cir. 1993) 9

In re Bastian Co., 45 Bankr. L. Rep. 717 (W.D.N.Y. 1985) 10

In re Bogosian, 112 B.R. 2 (Bankr. D.R.I. 1990) 9

In re Exquisito Servs., Inc., 823 F.2d 151 (5th Cir. 1987) 20

In re Harris, 85 B.R. 858 (S.D. Fla. 1994) 19

TABLE OF AUTHORITIES (cont.)

CASES (cont.) **Page(s)**

In re Island Club Marina, Ltd., 38 B.R. 847 (N.D. Ill. 1984) 19

In re Mason, 18 B.R. 817 (Bankr. W.D. Tenn. 1982)..... 19

Kawaauhau v. Geiger, 523 U.S. 57 (1998)..... 8

Kokosca v. Belford, 417 U.S. 642 (1974) 16

Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978)..... 24

Lubrizol Enters. v. Richmond Metal Finishers, 756 F.2d 1043 (4th Cir. 1985)..... 9

Meyer v. Comm'r, 383 F.2d 883 (8th Cir. 1967) 9

Missouri v. United States Bankruptcy Court, 647 F.2d 768 (8th Cir. 1981)..... 13

Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000) 11

NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984)..... 9

Ohio v. Kovacs, 469 U.S. 274 (1985) 12,22

Palmore v. Sidoti, 466 U.S. 429 (1984)..... 24

Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990)..... 9,12,21,22

Pennsylvania Peer Review Org. v. United States (In re Pennsylvania Peer Review Org.), 50 B.R. 640 (Bankr. M.D. Pa. 1985)..... 9

Perez v. Campbell, 402 U.S. 637 (1971)..... 26

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)..... 24

Rake v. Wade, 508 U.S. 464 (1993)..... 8,9

TABLE OF AUTHORITIES (cont.)

CASES (cont.) **Page(s)**

Toibb v. Ratliff, 501 U.S. 157 (1991)..... 8,16

Union Bank v. Wolas, 502 U.S. 151 (1991)..... 8

United States v. Estate of Romani, 523 U.S. 517 (1998)..... 11

United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979)..... 7,10,12

United States v. National Exchange Bank, 270 U.S. 427 (1926)..... 11

United States v. Ron Pair Enterps., Inc., 489 U.S. 235 (1989)..... 7,8

United States v. Vecchio (In re Vecchio), 20 F.3d 555 (2d Cir. 1994)..... 9

United States v. Whiting Pools, Inc., 462 U.S. 197 (1983)..... 12,16

United States v. Winstar Corp., 518 U.S. 839 (1996)..... 11

United States Trustee v. Columbia Gas Sys. Inc. (In re Columbia Gas Sys., Inc.), 33 F.3d 294 (3d Cir. 1994) 9

Village of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990) 24

STATUTES

7 U.S.C. § 204..... 13

11 U.S.C. § 101(5)(A)..... 21

11 U.S.C. § 101(12) 21

11 U.S.C. § 362(b)(4)..... 12

11 U.S.C. § 362(b)(8)..... 13

TABLE OF AUTHORITIES (cont.)

STATUTES (cont.) **Page(s)**

11 U.S.C. § 362(b)(12) 13

11 U.S.C. § 362(b)(13) 13

11 U.S.C. § 362(b)(16) 13

11 U.S.C. § 507(a)(8) 12

11 U.S.C. § 523(a)(1) 12

11 U.S.C. § 523(a)(8) 23

11 U.S.C. § 525 ..... *passim*

47 U.S.C. § 309(j) ..... *passim*

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 9

Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 9

Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 9

Bankruptcy Tax Act of 1980, Pub. L. No 96-589, 94 Stat. 3389 9

Comprehensive Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, 100 Stat. 82 10

Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 9

Intellectual Property Protection Act of 1988, Pub. L. No. 100-506, 102 Stat. 2538 9

Omnibus Consolidated and Emergency Appropriations Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 9

TABLE OF AUTHORITIES (cont.)

STATUTES (cont.) **Page(s)**

Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499(a) *et seq.* 13

Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181 *et seq.* 13

Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 102-365, 106 Stat. 972 10

OTHER LEGISLATIVE MATERIALS

H.R. 4690 § 618, 106th Cong. (2000) 14

H.R. 2670 § 618, 105th Cong. (1999) 14

S. Rep. No. 95-989 (1978) 13,16,25,28

H.R. Rep. No. 95-595 (1978) 28,29

124 Cong. Rec. S17,409 (Oct. 6, 1978) 13

124 Cong. Rec. H11,092 (Sept. 28, 1978) 13

Limits On Regulatory Powers Under the Bankruptcy Code, Hrng. Before Subcomm. Commercial and Admin Law of House Comm. on Judiciary, 106th Cong., 2d Sess. (April 11, 2000) 18

Letter from Hon. Tom Bliley, Hon. John D. Dingell, Hon. W.J. "Billy" Tauzin, Hon. Edward J. Markey, Hon. Henry J. Hyde, Hon. John Conyers, Jr., Hon. George W. Gekas, Hon. Jerrold Nadler, Hon. Richard K. Armey, and Hon. Richard J. Gephardt to Hon. William J. Clinton, Nov. 4, 1999 15,18

TABLE OF AUTHORITIES (cont.)

OTHER LEGISLATIVE MATERIALS (cont.) **Page(s)**

Letter from Hon. Tom Bliley, Hon W.J. "Billy" Tauzin, Hon. John D. Dingell, and Hon Edward J. Markey to Hon. Newt Gingrich, Hon. Richard A. Gephardt, Hon. Erskine Bowles, Hon. Bob Livingston, and Hon. David R. Obey, Oct. 15, 1998 15,17

Letter from Hon. Henry J. Hyde, Hon. George W. Gekas, Hon. John Conyers, Jr. and Hon. Jerrold Nadler to Hon. Bill Young, Hon. Harold Rogers, Hon. David R. Obey, and Hon. Jose E. Serrano, July 21, 1999 15

Letter from Hon. Orrin Hatch to Hon. Trent Lott, Oct. 19, 1998 15

Letter from Hon. Kay Bailey Hutchinson and Hon. Max Cleland, July 16, 1999 15

Letter from Hon. Robert J. Torricelli to Hon. Trent Lott, Oct. 18, 2000 15,17

OTHER AUTHORITIES

Able, "Hot Goods" Liability: Secured Creditors and the Fair Labor Standards Act, 87 Colum. L. Rev 644 (1987) 19

Bussel, Textualism's Failures: A Study of Overruled Bankruptcy Decisions, 53 Vand. L. Rev. 887 (2000) 10

Klee, Legislative History of the New Bankruptcy Law (1979), *reprinted in* Collier on Bankruptcy, App. Pt. 4, 199-215 (15th ed. 1996) 7

Note, Unsecured Creditors of Failed Banks: It's Not a Wonderful Life, 104 Harv. L. Rev. 1052 (1991) 19

This brief *amici curiae* is respectfully submitted in support of respondents, with the written consent of both parties.[1]

INTERESTS OF AMICI

The *amici* members of Congress are Senator Patrick Leahy, Senator Orrin Hatch, Senator Robert Torricelli, Senator Charles Schumer, Representative John Conyers, Representative Lindsey Graham, and Representative Jerrold Nadler. The congressional *amici* are a bipartisan group of Senators and Representatives with particular responsibility for and interest in the administration of the statutes at issue in this case. The legislative duties of the congressional *amici* include primary responsibility for balancing the many policies expressed in the Bankruptcy Code and the interests affected by it. Section 525 of the Code reflects such a balancing: consistent with the Code's overarching goal of providing debtors an opportunity for a fresh start, § 525 establishes a narrow but important check on the power of government to withhold or revoke needed licenses from debtors in bankruptcy. In the exercise of its responsibility to supervise the policy balances in the Code, Congress has previously considered and rejected proposals that would establish a narrow exemption from § 525 for licenses issued by the FCC. *Amici* strongly believe that, as this Court's precedents have repeatedly declared, the task of balancing the many, finely-calibrated interests at stake in the Bankruptcy Code is committed exclusively to Congress, and where Congress has spoken plainly to an issue in the Code, the courts should not construe the Code differently for asserted policy reasons.

It is the experience of the congressional *amici* that where sound policy requires an exception to a general rule in the

---

[1] Letters of consent have been filed with the Clerk. No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation and submission of this brief.

Code to serve the interests of government, Congress typically acts in responsible bipartisan fashion to create the needed exception. The task of balancing the different policies and interests reflected in the Code becomes more difficult when courts ignore those balances in favor of different policy judgments. The congressional *amici* therefore have a strong interest in the continuation of this Court's practice of interpreting the Code strictly as written.

Amicus Association of Communications Enterprises ("ASCENT") is an association of entrepreneurial and small business communications companies. Many of ASCENT's members are resellers of wireless services and are wholly dependent on existing facility-based wireless carriers as sources of supply. ASCENT's interest in this case arises out of the impending sunset of the FCC's "wireless resale rule" in November 2002 – which may terminate the FCC's rules requiring mandatory resale of wireless service. ASCENT is greatly concerned that the sunset of that rule will close off existing sources of supply and severely limit resale opportunities. Respondent NextWave proposes to build out a nationwide wireless PCS network and intends to offer its services on a wholesale basis to other carriers, resellers and mobile virtual network operators. NextWave's strategy of acting as a "carrier's carrier" will afford ASCENT's members continued opportunity to offer wireless services on a resale basis, even after the impending wireless resale sunset, and will encourage greater competition and consumer choice. ASCENT's members therefore share the interest of the congressional *amici* in enforcement of the plain text of § 525, which affords protection not only for debtors such as NextWave, but also for creditors and others, such as ASCENT's members, whose own businesses are closely related to the debtor's and may be deeply affected by the preservation of government licenses and similar assets critical to the debtor's financial viability.

SUMMARY OF ARGUMENT

Section 525 of the Bankruptcy Code bars a government agency from revoking a license solely because of the licensee's failure to pay a debt dischargeable in bankruptcy. Respondent NextWave's licenses were revoked because it failed to satisfy a payment obligation to the government on which the license was conditioned. The heart of the FCC's position in this case is the proposition that because those payment obligations served the FCC's "regulatory purposes," the licenses were properly revoked, despite the § 525 bar. The FCC is wrong. To the extent those payments served regulatory purposes – and there is no genuine dispute that they served other purposes as well, primarily revenue collection – the existence of such purposes does not carve respondent out from the explicit protection of § 525.

A. The Bankruptcy Code is a reticulated statute, crafted and refined through bipartisan legislative action. Congress drafted the initial language after years of work to balance numerous competing policy interests, and has amended the Code at various times over the years to reflect revisions in the policy judgments underlying the Code's language. Congress has understood that, because of the reliance interests that develop around the legal rules established by a commercial statute of this nature, it is especially important that Congress's policy judgments be reflected in the plain text of the Code. Recognizing and respecting the primacy of Congress in the establishment of bankruptcy policy, this Court's cases have consistently presumed that the text reflects Congress's considered policy judgments, and have hewed closely to the natural meaning of the text in applying Code provisions. Contrary to the premises of the FCC's argument, the Court has not applied its own policy gloss to the text, nor has it accorded presumptively favorable treatment to government entities such as the FCC. The Court has understood that where sound policy demands a special exemption from the opera-

tion of the bankruptcy laws for government entities, Congress can and will provide it.

B. Congress has repeatedly considered – and rejected – proposals to confer such an exemption from the operation of § 525 on licenses issued by the FCC. Members of Congress from both parties believed that depriving entities with FCC licenses of the protections of § 525 would contradict the fundamental policy of the Bankruptcy Code of allowing all debtors a fresh start, would unfairly favor the FCC over other creditors with significant financial interests at stake in the debtor's estate, and would undermine the ability of small businesses to generate the capital and financing necessary to facilitate their participation in license auctions. Though Congress rejected a narrow exemption for the FCC on those bases, what the FCC proposes here is more sweeping – an effective exemption from § 525 for *all* government agencies and *all* government licenses, so long as the agency can articulate some regulatory purpose for its licensing decisions. Given the broad impacts such a rule would have on the reliance interests of government licensees and their creditors throughout the economy, there is even less justification for impressing such a policy onto the Code by judicial fiat than for adopting a narrow FCC exemption by proper legislative amendment.

C. There is no doubting that adoption of the FCC's position here would require deviation from the plain text of § 525 – and therefore deviation from the policy judgments Congress made both in crafting § 525 and in rejecting the FCC's efforts to obtain special treatment under the provision. Respondent's license payment obligation plainly is a "debt" that is "dischargeable" in bankruptcy. It is equally clear that the FCC revoked the licenses "solely because" respondent failed to make payments on that debt. The FCC says that failure to make payments is a proxy for its interest in identifying licensees with the financial and other resources to develop the spectrum, but the undisputed fact is that if respondent had made its payment, the FCC would *not* have revoked the licenses, regardless of respondent's actual financial viability or spectrum development progress. And, finally, nothing in § 309(j) of the Communications Act required the FCC to make late payments the sole trigger for outright revocation of a license. Section 525 applies here not only because of a policy judgment by Congress favoring protection for debtors and creditors, but also because the FCC elected to base license revocation solely on the failure to make payments, rather than to impose any of a variety of other possible license requirements that would have served its spectrum-regulation interests equally well.

ARGUMENT

The licenses at issue in this case were automatically revoked by the FCC when the licensee, respondent NextWave, failed to make timely installment payments to the FCC while reorganizing under the bankruptcy laws. The question here is whether § 525 of the Bankruptcy Code prohibits the FCC from conditioning respondent's possession of its licenses on the timely satisfaction of each installment payment obligation, once respondent entered bankruptcy. Section 525 provides, in pertinent part, that "a governmental unit may not . . . revoke . . . a license . . . to . . . a person that is . . . a debtor under this title . . . solely because such . . . debtor . . . has not paid a debt that is dischargeable in the case under this title . . . ." 11 U.S.C. § 525(a).

The FCC contends that revocation of the licenses for failure to make timely installment payments was proper under § 525 – or despite § 525 – merely because "the FCC enforces the full and timely payment condition for regulatory reasons." FCC Br. 37. Those reasons are essentially that the FCC presumed that the highest bidder would be "the 'best' licensee," and that "the bidder's failure to make timely payment" – to miss even one payment, that is – "is fatal to its

implicit representation that it is the 'best' of the potential licensees," in terms of putting the spectrum to full use in the public interest. *Id.*

At the turn of every statutory phrase, the FCC offers this same argument for why § 525 is inapplicable. The license payment obligation is not a "debt," the FCC says, because it serves the FCC's regulatory purposes. The obligation is not "dischargeable" in bankruptcy, the FCC says, because it serves the FCC's regulatory purposes. And the license was not revoked "solely because of" respondent's failure to pay, the FCC says, because revoking the license for failure to pay serves the FCC's regulatory purposes. Nor does the FCC's reliance on this argument stop with the text of the statute. Whatever § 525's meaning for the revocation of licenses in other cases and contexts, the FCC suggests, it should be construed in the FCC's favor here because to do otherwise would put § 525 in conflict with another statute – the Communications Act – that establishes the regulatory purposes the FCC sought to serve by revoking the licenses.

As we elaborate below, *infra* at 21-30, this "regulatory purposes" defense fails at every step of the analysis, from the statutory text through to the policies the FCC cites. We begin, however, by addressing a key premise underlying the FCC's claims: this Court should construe § 525 to reflect not so much the natural meaning of its text, but rather the policies underlying § 309(j) of the Communications Act. As we show, this proposed interpretive mode is inconsistent with this Court's standard approach of construing the Code strictly, an approach that properly leaves to Congress the legislative task of drafting the Code to reflect the appropriate balance of competing policy objectives. To deviate from that approach in this case would be especially inappropriate, inasmuch as Congress has considered – and explicitly rejected – the very policy choice the FCC now asks this Court to graft onto § 525.

A. The Bankruptcy Code Reflects Congress's Balancing Of Numerous Policy Concerns, To Which This Court's Natural Meaning Interpretive Approach Properly Defers

1. The Bankruptcy Code was "long and minutely contemplated" by Congress before its enactment in 1978. *Bank of America Nat'l Trust v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 450 (1999). Members of Congress from both parties worked together "for nearly a decade" to formulate the Code, *United States v. Ron Pair Enterps., Inc.*, 489 U.S. 235, 241 (1989), in an effort "to bring an entire area of law under a single, coherent statutory umbrella," *203 North LaSalle*, 526 U.S. at 461 (Thomas, J., concurring); *see generally* Klee, Legislative History of the New Bankruptcy Law (1979) (detailing bipartisan process of drafting and enacting Code), *reprinted in* Collier on Bankruptcy, App. Pt. 4, 199-215 (15th ed. rev. 2002). While the process of legislating on any subject can be very difficult, and may sometimes result in compromises that lead to less rather than more textual clarity, the Bankruptcy Code is in many ways a unique statute. Years of bipartisan efforts to develop a sensible and coherent Code at the beginning, followed by continuous efforts to respond in the same vein to issues and problems that have arisen during the Code's application, have produced a largely workable balancing of the many competing interests involved. *See 203 North LaSalle*, 526 U.S. at 461 (Thomas, J., concurring) (noting only "rare instances when the Code is truly ambiguous"). Coherence – or at least understandability – is especially desirable in a commercial statute of this nature, for its operation affects the value of every investment in enterprises that are entitled to avail themselves of the law's protections. As this Court has recognized, the interests of those who lend or invest capital in an entity in reliance on the terms of the Code underscore the importance of applying the Code strictly in accordance with those terms. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 739 (1979) (declining to

accord government special priority for its loan liens in part because of other creditors' reliance interests).

2. This Court's cases thus consistently reflect the presumption that the plain text of the Code reflects Congress's considered judgment as to how given bankruptcy policy interests are best balanced. That is why this Court will apply the "natural reading" of the text of the Code, *even if* the Court believes bankruptcy policy would be better served otherwise. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000). As the Court elaborated in *Hartford Underwriters*:

> We do not sit to assess the relative merits of different approaches to various bankruptcy problems. It suffices that the natural reading of the text produces the result we announce. Achieving a better policy outcome . . . is a task for Congress, not the courts.

Id. Thus the mere fact "that Congress may not have foreseen all the consequences of a statutory enactment [in the Code] is not a sufficient reason for refusing to give effect to its plain meaning." *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991); *see id.* at 162 ("Whether Congress has wisely balanced the sometimes conflicting policies underlying [the Code] is not a question that we are authorized to decide."). Other decisions of this Court reflect this commitment to applying the most natural reading of the Code's text, rather than a construction derived from a preferred policy outcome. *See Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998); *Rake v. Wade*, 508 U.S. 464, 473 (1993); *Toibb v. Ratliff*, 501 U.S. 157, 164 (1991); *Ron Pair*, 489 U.S. at 241.

3. The validity of the presumption that Congress is fully capable of ensuring that the Code's text reflects Congress's considered policy views is amply confirmed by the history of continued bipartisan efforts to refine the Code since its original enactment. In particular, Congress has proved itself willing and able to adjust the Code, or other statutes, as needed to respond to issues raised in bankruptcy-related litigation at all levels. Thus, Congress has amended relevant statutes in response to decisions by this Court,[2] the federal courts of appeals,[3] and the bankruptcy courts.[4] One article identifies no

[2] *See, e.g., Rake, supra* (home mortgage interest), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 305, 108 Stat. 4106, 4134; *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990) (dischargeability of criminal restitution obligations), *superseded by* Crime Control Act of 1990, Pub. L. No. 101-647, § 3102(b), 104 Stat. 4789, 4916, *re-amended by* Bankruptcy Reform Act of 1994, *supra*, § 302, 108 Stat. at 4132; *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (rejection of collective bargaining agreements), *superseded by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541, 98 Stat. 333, 390; *Butner v. United States*, 440 U.S. 48 (1979) (mortgagee's security interest in rents), *superseded* by Bankruptcy Reform Act of 1994, *supra*, § 214(a), 108 Stat. at 4126.

[3] *See, e.g., United States Trustee v. Columbia Gas Sys. Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294 (3d Cir. 1994) (absent bond trustee investments), *superseded by* Bankruptcy Reform Act of 1994, *supra*, § 210, 108 Stat. at 4125; *Hillis Motors, Inc. v. Hawaii Auto Dealers' Ass'n*, 997 F.2d 581 (9th Cir. 1993) (state regulators' exception from automatic stay), *superseded by* Omnibus Consolidated and Emergency Appropriations Act of 1998, Pub. L. No. 105-277, § 603, 112 Stat. 2681, 2681-86; *United States v. Vecchio (In re Vecchio)*, 20 F.3d 555 (2d Cir. 1994) (status of late filed priority claims), *superseded by* Bankruptcy Reform Act of 1994, *supra*, § 213, 108 Stat. at 4125-26; *Lubrizol Enters. v. Richmond Metal Finishers*, 756 F.2d 1043 (4th Cir. 1985) (nondebtor licensee rights), *superseded by* Intellectual Property Protection Act of 1988, Pub. L. No. 100-506, § 1, 102 Stat. 2538, 2538; *Meyer v. Comm'r*, 383 F.2d 883 (8th Cir. 1967) (corporate profits), *superseded by* Bankruptcy Tax Act of 1980, Pub. L. No. 96-589, 94 Stat. 3389, 3406 (1980).

[4] *See, e.g., In re Bogosian*, 112 B.R. 2 (Bankr. D.R.I. 1990) (Bankruptcy Rule 4001(a)(2) time limits not enforceable in lift stay proceeding), *superseded by* Bankruptcy Reform Act of 1994, *supra*, § 101, 108 Stat. 4106, 4107; *Pennsylvania Peer Review Org. v. United States (In re Pennsylvania Peer Review Org.)*, 50 B.R. 640 (Bankr. M.D. Pa. 1985) (assumption of personal services contracts), *superseded by* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 283(e), 100 Stat. 3088, 3117; *Dallas-Fort*

fewer than fifty-eight bankruptcy-related judicial decisions that Congress has addressed directly to provide for desired treatment of particular issues or parties in bankruptcy proceedings. *See* Bussel, Textualism's Failures: A Study of Overruled Bankruptcy Decisions, 53 Vand. L. Rev. 887, 902, 930-38 (2000).

As the title of that article suggests, its author draws from these "legislative overrulings" the lesson that this Court's practice of adhering to the natural meaning of the Code is an inappropriate approach to construing the Code. The opposite is true. As we have explained, the history establishes that when this Court simply applies the natural meaning of the text, it both respects reliance interests accumulated on the basis of that text, and it leaves for Congress the opportunity to assess whether the text reflects the proper balancing of judgments. The practice also allows Congress to respond with much more precision in textual adjustment than a court can wield in applying a general policy gloss to the statutory text. *See generally Kimbell Foods*, 440 U.S. at 739-40 ("Because the ultimate consequences of altering settled commercial practices are so difficult to foresee, we hesitate to create new uncertainties, in the absence of careful legislative deliberation."). Bankruptcy law and policy are much better served when the courts hew closely to the text of the Code, and leave to the legislative branch the responsibility and opportunity to fine-tune that text as necessary – and, it is important to add, only to the extent necessary.

Worth Reg'l Airport Bd. v. Braniff Airways, 26 B.R. 628 (Bankr. N.D. Tex. 1982) (rejection of airport facilities leases), *superseded by* Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 102-365, § 19(b), 106 Stat. 972, 982; *In re Bastian Co.*, 45 Bankr. L. Rep. 717 (W.D.N.Y. 1985) (rejection of pension plan), *superseded by* Comprehensive Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, § 11007(a), 100 Stat. 82, 244 (1986).

4. In addition to the "policy-interpretive" approach underlying the FCC's position, the FCC also rests its argument on the implicit premise that the Bankruptcy Code presumptively privileges government and the exercise of its regulatory functions. That notion is quite wrong: this Court's cases for decades have correctly observed that Congress presumptively treats the government under the bankruptcy laws "like any other general creditor." *United States v. Estate of Romani*, 523 U.S. 517, 531 (1998) (citing *Davis v. Pringle*, 268 U.S. 315 (1924); *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U.S. 152 (1912)). Such treatment is consistent with the approach both Congress and this Court typically take toward the government when it engages in commercial transactions of any kind. *See, e.g., Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000) ("When the United States enters into contractual relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." (internal quotations marks omitted)); *United States v. Winstar Corp.*, 518 U.S. 839, 893-94 (1996) (plurality op.) (rejecting government argument that law "enacted to govern regulatory policy and to advance the general welfare" is automatically exempted from standard operation of contract rules); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943) ("The United States does business on business terms.") (quoting *United States v. National Exchange Bank*, 270 U.S. 427, 534 (1926) (Holmes, J.)); *Cooke v. United States*, 91 U.S. 389, 396 (1875) ("when the United States become parties to commercial paper, they incur all the responsibilities of private persons under the same circumstances"); *see also Franconia Assocs. v. United States*, No. 01-455 (June 10, 2002) (applying foregoing principles in declining to adopt reading of Tucker Act provision that would treat government more favorably than similarly-situated private parties).

The basis for this presumption is unassailable: as the history, discussed above, of Congress's response to judicial decisions demonstrates, when the government needs special treatment in certain business transactions that reflect or serve particularly important regulatory goals, Congress can and does provide the necessary protections. Indeed, several provisions of the Bankruptcy Code do provide for special or preferred treatment for the Government as a creditor in bankruptcy. *See, e.g.*, 11 U.S.C. § 507(a)(8) (priority for unsecured tax claims); *id.* § 523(a)(1) (nondischarge of certain tax liabilities); *see also infra* at 13 (citing specific exceptions to automatic stay for certain types of debts to government). These are the exceptions that literally prove the rule: unless the Code or other laws explicitly provide for special treatment in bankruptcy court for government claims, such claims receive no privilege merely because they are backed by some valid regulatory purpose. *See, e.g., United States v. Whiting Pools, Inc.*, 462 U.S. 197, 209 (1983) ("We see no reason why a different rule should obtain when the IRS is the creditor. . . . Nothing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector in the form of an exclusion from the estate of property seized to satisfy a tax lien."); *see also Pennsylvania Pub. Welfare Dep't v. Davenport*, 495 U.S. 552 (1990) (no special treatment for restitution obligation in absence of specific Code exception); *Ohio v. Kovacs*, 469 U.S. 274 (1985) (same for monetized environmental clean-up obligation); *cf. Kimbell Foods*, 440 U.S. at 734 (declining "unreflective extension of rules [priority of tax liens] that immunize the United States from the commercial law governing all other secured creditors").

Even where Congress *has* released governmental units from certain constraints of bankruptcy law, such exceptions are narrowly tailored and carefully circumscribed. These include the "police and regulatory powers" exception to the automatic stay provision of the Code, 11 U.S.C. § 362(b)(4).

To maintain an adequate shield for debtors, congressional sponsors made clear that § 362(b)(4) is to "be given a narrow construction," applying only to "actions to protect the public health and safety" and not "to actions . . . to protect a pecuniary interest." 124 Cong. Rec. H11,092 (Sept. 28, 1978) (statement of Rep. Edwards); 124 Cong. Rec. S17,409 (Oct. 6, 1978) (statement of Sen. DeConcini); *see, e.g., Missouri v. United States Bankruptcy Court*, 647 F.2d 768, 776 (8th Cir. 1981) (§ 362(b)(4) does not allow government creditor to enforce regulations concerning operation and liquidation of insolvent public grain elevators that conflict with bankruptcy court's authority, even though regulations motivated in part by regulatory aims). Recognizing the narrow scope of this exception, some federal agencies over the years have sought – and Congress has provided – more specific exceptions from the automatic stay rule. Those exceptions explicitly exempt the collection efforts of specified agencies for certain kinds of debts – efforts with clear regulatory aims that nonetheless did not qualify as exercises of "police or regulatory powers" under § 362(b)(4). *See* 11 U.S.C. § 362(b)(8) (foreclosure on certain HUD mortgages); *id.* § 362(b)(12)&(13) (foreclosure on ship mortgages held under the Merchant Marine Act); *id.* § 362(b)(16) (federal student loan program eligibility determinations).

Congress has even seen fit to provide exemptions in the terms of § 525 itself for certain types of government licenses. *See* 11 U.S.C. § 525 (exempting licenses and grants under Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499(a) *et seq.*; under Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181 *et seq.*; and under 7 U.S.C. § 204). As the next section shows, the FCC has repeatedly – and unsuccessfully – sought similar special treatment for FCC licenses in bankruptcy proceedings.

B. Congress Has Considered And Rejected FCC Proposals To Exempt Spectrum Licenses From Bankruptcy Code § 525

As noted above, the FCC's position in this litigation is fundamentally premised on the assertion that the power to revoke the licenses of a debtor in bankruptcy who misses a payment is necessary to enforce the policies underlying § 309(j) of the Communications Act. *See supra* at 5-6. But the FCC has already sought precisely that authority from Congress, in a variety of forms, including a specific amendment to § 309(j) itself. Those proposals generated bipartisan opposition and were repeatedly rejected. Their consistent failure demonstrates that Congress, which of course established the very § 309 policies on which the FCC now relies, does not share the FCC's view that those policies support special treatment for its licenses under § 525.

1. Consecutive Congresses have considered Administration proposals that would have amended the auction provisions of the Communications Act, 47 U.S.C. § 309(j), to exempt FCC licenses altogether from the operation of § 525. The proposed amendment, which appeared in several bills, read in relevant part: "Title 11 . . . shall not apply . . . to the Commission . . . with respect to . . . and act by the Commission to issue, deny, cancel, or transfer control of . . . a license or permit." H.R. 4690 § 618, 106th Cong. (2000); H.R. 2670 § 618, 105th Cong. (1999).

Opposition to this proposal was strong and bipartisan. In November 1999, ten members of the House, including Majority Leader Armey and Minority Leader Gephardt, as well as the chairmen and ranking members of four governing committees and subcommittees, sent a letter to the President warning that granting the FCC authority to "seize in bankruptcy proceedings radio licenses previously issued to telecommunications companies . . . would be contrary to both current telecommunications policy and bankruptcy law."

Letter from Hon. Tom Bliley, Hon. John D. Dingell, Hon. W.J. "Billy" Tauzin, Hon. Edward J. Markey, Hon. Henry J. Hyde, Hon. John Conyers, Jr., Hon. George W. Gekas, Hon. Jerrold Nadler, Hon. Richard K. Armey, and Hon. Richard J. Gephardt to Hon. William J. Clinton, Nov. 4, 1999 ("Nov. 4, 1999 Letter"). In another letter, Republican and Democratic leaders of the House Commerce Committee argued that the proposal would "fundamentally alter the bankruptcy protections" available to FCC licensees, with "unintended consequences" that could "significantly upset market equities and constitute bad economic policy." Letter from Hon. Tom Bliley, Hon W.J. "Billy" Tauzin, Hon. John D. Dingell, and Hon Edward J. Markey to Hon. Newt Gingrich, Hon. Richard A. Gephardt, Hon. Erskine Bowles, Hon. Bob Livingston, and Hon. David R. Obey, Oct. 15, 1998, at 2 ("Oct. 15, 1998 Letter"). And leaders of the Judiciary Committee from both parties contended that the proposal would "endow[] the FCC with more protections than virtually any other creditor, including the Internal Revenue Service, has under current bankruptcy law," and could "potentially destroy a [licensee] debtor's prospect for economic rehabilitation and deprive creditors of a major source of repayment." Letter from Hon. Henry J. Hyde, Hon. George W. Gekas, Hon. John Conyers, Jr. and Hon. Jerrold Nadler to Hon. Bill Young, Hon. Harold Rogers, Hon. David R. Obey, and Hon. Jose E. Serrano, July 21, 1999, at 2.[5]

---

[5] *See also* Letter from Hon. Orrin Hatch to Hon. Trent Lott, Oct. 19, 1998 (describing FCC proposal as "backdoor attempt to effectively make the protections afforded by the bankruptcy laws ineffective when the FCC is in the position of creditor in bankruptcy court"); Letter from Hon. Robert J. Torricelli to Hon. Trent Lott, Oct. 18, 2000 ("Torricelli Letter") ("It is unreasonable . . . for the FCC to conclude that its licensees should be denied the rights afforded to all by the bankruptcy laws to cure defaults, reorganize, and emerge as a viable enterprise. Such a conclusion is both inequitable and antithetical to Congress' original intent regarding the protection of small business' access to spectrum."); Letter from Hon.

2. As the foregoing statements reveal, congressional opposition to exempting FCC licenses from § 525 was founded on at least three related concerns.

a. One concern was that stripping FCC licensees of the protections of § 525 would seriously threaten the viability of those licensees, many of which were nascent enterprises whose primary assets were their licenses. Congress understandably believed that destroying the ability of licensees to operate by seizing their licenses would contradict the most fundamental policies underlying the Bankruptcy Code: the twin "recognized policies" of "preserving going concerns and maximizing property available to satisfy creditors." *203 North LaSalle*, 526 U.S. at 453; *see Toibb*, 501 U.S. at 163; *Kokosca v. Belford*, 417 U.S. 642, 645-46 (1974). The congressional drafters of § 525 itself expressly recognized that many kinds of government licenses can "seriously affect the debtor's livelihood," and thus require a measure of protection in bankruptcy. S. Rep. No. 95-989, at 81; *see id.* (§ 525 enacted to provide "additional debtor protection"). Congress enacted § 525 specifically to build upon the result in *Perez v. Campbell*, 402 U.S. 637 (1971), which it understood as recognizing that revocation even of a driver's license "would frustrate the Congressional policy of [providing] a fresh start for a debtor." S. Rep. No. 95-989, at 81. Revocation of FCC licenses would undermine that policy even more dramatically; the FCC does not contend otherwise. *Cf. Whiting Pools*, 462 U.S. at 203 (Congress recognized that a "reorganization effort would have small chance of success . . . if property essential to the running of the business were excluded from the estate"). Congress's rejection of the FCC's request thus reflected the judgment that the bankruptcy laws should protect debtors – even those highly dependent on

---

Kay Bailey Hutchinson and Hon. Max Cleland, July 16, 1999 (§ 618 "would alter the bankruptcy rights of businesses that hold licenses issued by the FCC").

government licenses – not drive them to almost certain failure.

b. Another, related congressional concern was that giving the FCC special favored status among creditors would be unfair to licensees' private creditors. *See, e.g.*, Oct. 15, 1998 Letter, *supra* (FCC proposal "elevates the claims of the Government above all others, including other creditors"). As the discussion above shows, the bankruptcy laws exist to protect creditors as much as debtors, and giving the FCC special treatment would not only be inequitable, but in many cases would inflict serious financial injury on private creditors by depriving the debtor's estate of assets critical to repayment of outstanding obligations.

This is not to say that Congress saw *no* regulatory purposes underlying the license auction and timely payment requirements. The point is that Congress recognized that the FCC *also* had pecuniary interests – that the FCC was, in other words, acting as a typical creditor as much as it was acting as a typical regulator, when it sold access to the public spectrum to private entities for money, and extended those entities credit toward their purchases. Congress understandably took account of that fact when it rejected the FCC's requests for special treatment under § 525.

c. A final concern voiced by members of Congress opposing the FCC's request for a special exemption from § 525 was that such an exemption would actually undermine the very Communications Act policies the FCC was citing in support of its request. Those policies were to encourage spectrum ownership diversification by facilitating small-business license ownership. *See* 47 U.S.C. § 309(j)(3)&(4). The concern of those opposed to the FCC's request for special treatment was that depriving these small businesses of the usual protections of the Bankruptcy Code would create a serious obstacle to obtaining the capital and financing necessary for these companies to commence or maintain opera-

tions. As Representative Graham put the point bluntly, "Who in the world would lend money to a radio or TV station that bought some spectrum at the auction if you could just come in there at any moment and just take the thing over?" Limits On Regulatory Powers Under the Bankruptcy Code, Hrng. Before Subcomm. Commercial and Admin Law of House Comm. on Judiciary, 106th Cong., 2d Sess. 47 (April 11, 2000); *see also id.* at 55 (Rep. Graham) ("My concern is that if we go the route you want us to, that the private sector is going to be very adversely affected, and if you don't honor these pecuniary relationships in some fair way to the rest of the creditors in the world who deal with these people, that the Government is going to destroy the ability for these people to succeed at small businesses . . . or buy spectrum licenses. And I just think that would be devastatingly bad for the economy . . . ."); Nov. 4, 1999 Letter, *supra* ("Start-up telecommunications providers will not be able to attract the capital investment they so desperately need if their most valuable asset is subjected to a perfected, first priority security interest of the Federal Government."); Torricelli Letter, *supra* (changing statute to allow FCC to seize licenses of providers in bankruptcy would be "antithetical to Congress' original intent regarding the protection of small business' access to spectrum.").

That concern was well-founded, as evidenced by what the FCC asks the Court to do here. The FCC itself recognized that one of the central causes of concentration in spectrum ownership was comparatively inadequate capital available to non-incumbent providers. FCC Br. 3-4. To compete successfully in the auctions, and in the development of the spectrum, new entrants had to obtain financing and investments premised on the expected value of the license. An inherent part of the license-value calculation would have been the likelihood of loss or revocation. The FCC would now apply to these struggling new entrants an automatic "one-strike-and-you're-out" revocation policy – no matter how

much work has been done to get the business going, and no matter how many installment payments have been made on the license bid price, the FCC would "automatically cancel" the license of any entity that missed even one payment. Even worse, the regulation makes no apparent provision for return of all or part of previous installment payments. If a new entrant missed the last payment by a month or a week or a day, the FCC would revoke its license *and* keep its money, leaving the entity essentially valueless in many cases. There can be little doubt that, had Congress changed the law to authorize the "one strike" license cancellation policy the FCC now seeks to enforce, potential investors would have been strongly discouraged from investing at all, or strongly encouraged to put a huge price on capital debt or equity.[6] As congressional opponents of special treatment for the FCC understood, either consequence would disserve § 309(j)'s goals of facilitating spectrum ownership by smaller, new entrants to the business.

3. Finally, it bears emphasis that the policy gloss the FCC asks this Court to impose on § 525 is markedly broader than the specific exemption the FCC sought from Congress. By its terms § 525 applies to any "license, permit, charter, franchise or other grant" from any "governmental unit." Section 525's protections thus extend to debtors with real estate licenses, *e.g.*, *In re Harris*, 85 B.R. 858 (S.D. Fla. 1994), liquor licenses, *e.g.*, *In re Mason*, 18 B.R. 817 (Bankr. W.D. Tenn. 1982), building permits, *e.g.*, *In re Island Club*

---

[6] *Cf.* Able, "Hot Goods" Liability: Secured Creditors and the Fair Labor Standards Act, 87 Colum. L. Rev 644, 652 (1987) (regulation may "increase[] the risk – and therefore the cost – of credit"); Note, Unsecured Creditors of Failed Banks: It's Not a Wonderful Life, 104 Harv. L. Rev. 1052, 1069-70 (1991) (noting that "even the possibility" of arbitrary exercise of FDIC discretion in bank regulation could "hamper the ability of ailing networks to obtain additional credit," which "would increase the cost of that credit, and the FDIC could find even more institutions in its charge").

Marina, Ltd., 38 B.R. 847 (N.D. Ill. 1984), and food franchises, *e.g.*, *In re Exquisito Servs., Inc.*, 823 F.2d 151 (5th Cir. 1987). What the FCC sought from Congress was an exemption from § 525 *only* for licenses issued by the FCC. What the FCC in effect seeks from this Court is an exemption from § 525 for *all* licenses and other grants issued by *all* governmental agencies, so long as the agency can identify some regulatory purpose supporting the license and its revocation. We can be certain, however, that the regulatory purposes the FCC cites as urgent here would not be as urgent in all cases. And yet the FCC proposes no principled basis on which the Court could hold that FCC licenses are broadly exempt from § 525, but licenses, permits and franchises issued by other agencies are not. By contrast, that is exactly the kind of decision Congress is well-equipped to make, i.e., which kinds of licenses deserve special treatment under § 525, and under what circumstances. A decision by this Court accepting the FCC's argument here would tear a wide hole through the Code, fundamentally altering the bankruptcy rights of government license-holders everywhere, with no contextual appreciation of the need to alter those rights.[7]

Judicial adoption of the policy rejected by Congress thus would not only rework the balance struck by Congress be-

[7] There would also be unpredictable "ripple" effects throughout the Code if the Court adopted other arguments the FCC is making. The terms of art "debt" and "dischargeable," for example, are fundamental concepts animating much of the Code's operation. If the Court were to interpret those terms to exclude from § 525 the payment obligation here simply because it reflects a regulatory function, that interpretation presumably would apply to all uses of those terms in the Code. It is impossible to predict the number and nature of transactions that would be affected by such an interpretation of dischargeable debt. At a minimum, it is clear that such an approach would wreak havoc on the baseline rule that the government should be treated like any other creditor, subject only to limited exceptions specified clearly in the Code.

tween the regulatory interest in licensing and the bankruptcy law interest in protecting debtors and creditors. It would also do so without any sense of the true force of the government's interest in all the cases that would be affected by the ruling. The broad sweep of the ruling would thus compound the already serious unfairness of imposing a retroactive change; it would upset expectations not only of FCC licensees and their creditors, but also those of many other government licensees and their creditors. Avoiding such compound and unpredictable results is precisely why this Court properly leaves bankruptcy policy judgments to Congress.

C. The Natural Meaning Of Code § 525 Accurately Reflects Congress's Intention To Afford FCC Licensees And Their Creditors The Standard Protections Of The Bankruptcy Code

Section 525 is, quite plainly, an explicit limitation on the authority of all government agencies to exercise their regulatory power to grant, deny, and revoke government licenses. The FCC nevertheless argues without a hint of irony that § 525 is inapplicable precisely *because* its license revocation reflects the exercise of regulatory power. That argument cannot be reconciled with the plain text of § 525, which – as Congress has already adjudged in rejecting the FCC's efforts to obtain an exemption – is also fully consistent with relevant Bankruptcy Code and Communications Act policies.

1. The FCC relies on its "regulatory purposes" argument to escape the force of each element of § 525. Those efforts are unavailing.

a. The FCC first argues that "[b]ecause the payment obligations in the licenses are regulatory conditions, they are not debts" under § 525. FCC Br. 30. A "debt" under the Code is a "liability on a claim," 11 U.S.C. § 101(12), and a "claim" is a "right to payment," *id.* § 101(5)(A). In *Davenport*, *supra*, this Court held that a restitution obligation im-

posed in a criminal proceeding, though obviously supported by the regulatory purposes of compensating crime victims and deterring misconduct, was nevertheless a "debt" within the meaning of the Code:

> [T]he language employed to define "claim" . . . makes no reference to purpose. The plain meaning of a "right to payment" is nothing more or less than an enforceable obligation, *regardless of the objectives the State seeks to serve in imposing the obligation.*

495 U.S. at 559 (emphasis added). And in *Kovacs*, *supra*, the Court similarly held that an environmental clean-up injunctive order that had been reduced to a monetary payment obligation was also a "debt" under the Code. 469 U.S. at 278-81. The argument that the license payment obligation here is not a "debt" cannot be reconciled with *Davenport* and *Kovacs*.

b. The FCC next argues that § 525 does not apply because respondent's debt is not "dischargeable" in the bankruptcy case. It is not dischargeable, the FCC contends, because it is a regulatory condition the bankruptcy court lacks authority to alter. FCC Br. 32-34. As the FCC puts it, "[t]he bankruptcy court had no more authority to allow respondents to retain the licenses despite failure to make timely payments than the court could void other regulatory provisions of respondents' licenses, such as the requirement that they actually build out a communications network by the prescribed deadline." FCC Br. 32-33.

That argument is a non sequitur. An obligation to pay money is a "debt" within the meaning of § 525; a network build-out requirement is not. The fact that a bankruptcy court could not "discharge" a build-out schedule that is not a "debt" says nothing about whether the court can discharge a payment obligation that plainly *is* a "debt" under § 525. For example, even though a government education loan

might include obligations – such as draft registration – beyond the authority of a bankruptcy court to excuse, that fact does not automatically render the loan repayment obligation beyond the court's power to discharge in bankruptcy. *See* 11 U.S.C. § 523(a)(8) (government education loan not excepted from discharge if exception would cause debtor undue hardship). Merely describing a debt as a regulatory condition, in other words, does not put the debt on a par with all other regulatory conditions of the license in respect to dischargeability.

c. Finally, the FCC contends that because it had a regulatory reason underlying its decision to allow respondent to retain the licenses only so long as it made timely installment payments, the revocation of the licenses was not, in fact, "solely because of" respondent's failure to pay. FCC Br. 36-38. That argument is also incorrect.

The FCC actually makes two distinct claims on this point. First, it argues that the existence of an underlying regulatory purpose behind the revocation establishes that the FCC did not revoke the licenses *solely* because of the failure to make a timely payment, but for that reason *and* whatever reasons lay behind it. FCC Br. 37-38. This contention confuses the subjective-intent-based concept of *motive* or *animus* with the objective question of *causation*, which is all that this aspect of § 525 is directed to. The FCC's contention is akin to the argument long rejected in the Title VII customer preference cases. The employers in those cases claimed that while they had refused to hire certain employees on the basis of race, their *motive* in doing so was not animus or hostility to racial minorities, but to accommodate the preferences of customers, who would not want to deal with minority employees. That argument failed: the question in those cases was not whether the employer had a non-race-based reason for refusing to hire minority employees, but simply whether race was the criterion the employer used to

deny employment. *See, e.g., Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1530 (7th Cir. 1990) (Posner, J.) ("Suppose a merchant refuses to hire black workers not because he is racist but because he believes that his customers do not like blacks and will take their business elsewhere if he hires any. The refusal is nevertheless discrimination, because it is treating people differently on account of their race."); *cf. Palmore v. Sidoti*, 466 U.S. 429 (1984) (use of prohibited classification, regardless of motive behind it, triggers heightened judicial scrutiny); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) (similar).

Similarly, even if the FCC had distinct, good-government motives *behind* its revocation of the licenses, the undisputed fact is that respondent's failure to make timely payment on a dischargeable debt was the sole criterion that triggered revocation of the licenses. That is, regardless of respondent's financial position or ability to use the network, the FCC would not have revoked respondent's licenses had it made timely payments. And conversely, even if respondent had an unparalleled financial position and first-rate spectrum utilization, the FCC's rule still would have required revocation of its licenses had respondent failed to make a single timely payment. Accordingly, the licenses were revoked "solely because" respondent failed to make payments, regardless of the motivations the FCC had for acting solely on that basis.[8]

---

[8] By similar analogy to employment discrimination cases, Arctic Slope argues that the existence of a regulatory purpose renders this a "mixed motives" situation, and that addition of the word "solely" before "because of" in § 525 excludes such situations from § 525's ambit. Arctic Slope Br. 25. Arctic Slope is wrong. The so-called "mixed motives" situation arises where the defendant actually acted against the individual on the basis of two or more criteria – i.e., gender and personality – and the question is whether the proscribed criterion can be said to have truly *caused* the adverse action. *E.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (plurality op.); *id.* at 284 (Kennedy, J., dissenting). No such problem of causation arises where the defendant indisputably acts on the basis of just *one* impermissible criterion, but asserts that the one criterion is a statistical proxy for other, permissible motives. In that instance there is only one "cause," though there may be many motives. Thus, even if the word "solely" appeared in Title VII, the outcome in customer preference cases would be the same, for there is only one "cause" in those cases – though "mixed motives" cases might be evaluated differently, since they really involve mixed *causes*. Conversely, the word "solely" is not superfluous under the D.C. Circuit's reading of § 525, as Arctic Slope contends, Br. 25: its use in § 525 bars agencies from revoking a license solely for failure to make a payment, but operates to *allow* them to revoke a license *even on that basis*, so long as other conditions also justify revocation. *See infra* at 28-29 (discussing additional factors on which FCC could have based revocation of license).

Second, the FCC argues that § 525 erects only a barrier to "discrimination" against licensees in bankruptcy, and that because other licensees *not* in bankruptcy would also lose their license for failure to make payments, there is no "discrimination" against bankrupt licensees and, hence, no violation of § 525. FCC Br. 37. The problem for the FCC is that the plain language of § 525 is not limited to barring "discrimination" against license-holders simply "for entering bankruptcy." FCC Br. 37. *In addition to* that general prohibition against anti-bankruptcy animus, the text of § 525 *also* bars the government from using the failure of a bankrupt licensee to make a debt payment as the sole basis for revoking its license. *See* S. Rep. No. 95-989, at 81 (§ 525 extends to "discrimination *or other action* based solely on the basis of the bankruptcy, on the basis of insolvency before or during bankruptcy prior to a determination of discharge, *or* on the basis of nonpayment of a debt discharged in the bankruptcy case") (emphasis added). If § 525 is to this extent a form of affirmative protection for licensees in bankruptcy that is unavailable to other, non-bankrupt licensees, it is merely the kind of affirmative protection for debtors in bankruptcy the entire Code exists to provide. It assuredly does not render the plain terms of § 525 inoperative.

2. The FCC's efforts to escape the force of § 525 on the basis of its asserted "regulatory purposes" fail not only the terms of § 525's text and recent history, but also the holding of *Perez v. Campbell*, 402 U.S. 637 (1971), which the provision was intended to elaborate. The only material difference between *Perez* and this case is that in *Perez*, the government revoked a license for failure to pay a *private* debt, whereas here the debt was to the FCC in exchange for the license itself. But in fact that is no difference at all, as closer scrutiny of the FCC's rationale for revoking the license reveals.

The FCC in this case argues that revoking the license for failure to make timely payments was the only way it could ensure "best use of the spectrum in the public interest." FCC Br. 40. Even accepting that dubious proposition as true for the moment, *but see infra* at 28-29, that rationale presumably would apply equally to a licensee's failure to make timely payments *to its own private creditors*: in either instance, the failure to pay would reflect financial weakness potentially undermining the licensee's ability to put the spectrum to full use. Thus the FCC's justification for revoking respondent's licenses for nonpayment of a dischargeable debt to the FCC necessarily would also authorize it to revoke a license for failure to pay *any* debt that is dischargeable in bankruptcy. And that is exactly what § 525 prohibits, if its plain text, and this Court's holding in *Perez*, mean anything at all.

3. Finally, the natural meaning of § 525's text is not inconsistent with the Communications Act policies the FCC cites as justification for adopting a different interpretation – which is among the reasons why Congress did not see fit to recast the statutory balance in the way the FCC now urges.

Section 309(j) of the Communications Act encourages the FCC to consider the use of methods like installment payment plans to facilitate the participation of small businesses in the auction processes and, ultimately, to promote diversity of spectrum ownership. 47 U.S.C. § 309(j)(3)&(4).

That policy would be thwarted, the FCC says, if § 525 prohibits it from revoking licenses when installment payment obligations are not met.

The FCC's argument misapprehends both § 309(j) and § 525. It is perfectly clear that nothing in § 309(j) required the FCC to use installment plans without guaranteed credit. The FCC's own brief recognizes that Congress directed the FCC only to "'*consider* alternative payment schedules and methods of calculation, including lump sums or *guaranteed* installment payments' to promote small business participation." FCC Br. 48 (emphasis added) (quoting 47 U.S.C. § 309(j)(4)(A)). More to the point, nothing in § 309(j) required the FCC to use the failure to make timely payments as *the conclusive proxy* for its regulatory goals of ensuring optimal spectrum usage. Even taken on its own terms, the FCC's assertion that § 309(j) encouraged use both of installment payments and of the presumption that the highest bidder was the "best" spectrum user, FCC Br. 40, provides no support for the FCC's decision to condition revocation of licenses merely on the *timeliness* of installment payments made by the highest bidder. That was a decision voluntarily made solely by the FCC, strongly influenced no doubt by its pecuniary interest in obtaining payments for the federal Treasury. Section 309 does not say – or imply – that the FCC not only ought to allow installment payments, but also ought to revoke licenses when such payments are not timely. Accordingly, enforcing the text of § 525 to prevent the FCC from revoking a license solely for violation of a payment timing condition poses no conflict at all with § 309(j).

The FCC also errs in its estimation of the scope of § 525. The FCC complains that, as interpreted by the D.C. Circuit, § 525 would "force an agency to give an exclusive license to a business that fails to meet a key regulatory requirement for maintaining the license," setting up the conflict with § 309(j). FCC Br. 42. Not so. It was the FCC's own deci-

sion to make timely installment payments the *only* "key regulatory requirement for maintaining the license." Having chosen to so limit itself, the FCC subjected its control over possession of licenses to the restrictions of § 525.

That choice was not compelled by § 525. Section 525 absolutely does not bar government agencies making licensing decisions from "consideration of other factors, such as future financial responsibility or ability." S. Rep. No. 95-989, at 81. Nor does it

> extend so far as to prohibit examination of the factors surrounding bankruptcy, the imposition of financial responsibility rules if they are not imposed solely on former bankrupts, or the examination of prospective financial condition or managerial ability .... [I]n those cases where the causes of a bankruptcy are intimately connected with the license ... in question, an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy.

H.R. Rep. No. 95-595, at 165 (1978). Accordingly, an agency may revoke the license of a debtor in bankruptcy so long as the trigger for revocation is something *other than* the debtor's mere presence in bankruptcy or mere failure to make a dischargeable debt payment. *See, e.g., Duffey v. Dollison*, 734 F.2d 265, 272-74 (6th Cir. 1984) (upholding application to debtor in bankruptcy of law requiring suspension of driver's license where driver has failed to pay judgment *and* failed to post proof of financial responsibility); *In the Matter of Bradley*, 989 F.2d 802, 804 (5th Cir. 1993) ("Section 525 does not prohibit a state from denying or revoking a license based upon a determination that the public safety would be jeopardized by granting or allowing continued possession of the license, but it does prohibit a state from exacting a discharged debt as the price of receiving or

retaining a license."); *In re Colon*, 102 B.R. 421, 428 (Bankr. E.D. Pa. 1989) ("If state law mandates the suspension or revocation of driving privileges due to the nature of the infraction or the driver's history of traffic violations, irrespective of whether the driver promptly pays a fine, the bankruptcy code will not interfere with the exercise of the police power.").

There are numerous ways the FCC in this case could have avoided the force of § 525 by connecting the regulatory requirements for maintaining licenses more tightly to its true regulatory interests in spectrum usage, and less tightly to its pecuniary interests in simply enforcing payment obligations. For example, the FCC could have conditioned possession of licenses on satisfaction of periodic network build-out obligations. The FCC could have imposed financial requirements other than payment obligations, such as the financial responsibility rules specifically suggested in the committee reports accompanying the Code. The FCC could even have conditioned license-holding on occasional totality-of-the-circumstances inquiries into a licensee's continued fitness to hold a license, which could have permissibly included an "examination into the circumstances surrounding bankruptcy." H.R. Rep. No. 95-595, at 165.

Enforcement of those or similar regulatory requirements for licensees would have allowed the FCC to fully serve the goals of § 309(j) without running into any § 525 limitations whatsoever. What the FCC could *not* do was to make mere failure to pay a dischargeable debt the sole, blanket proxy for *all* of its regulatory considerations. As Congress has already implicitly determined, the fact that the FCC voluntarily chose to serve its § 309(j) goals by a mechanism that would trigger § 525's protections for licensees is no reason to disregard those protections.

* * * * *

Ignoring § 525's plain textual restriction on the government's power to revoke a license for failure to pay a dischargeable debt whenever the government asserts a regulatory purpose for the revocation – a rule-swallowing exception appearing nowhere in the Code's text – would do violence not only to this Court's practice of adhering solely to the text, but also to the sound principle of deference to congressional policymaking that underlies that practice. As we have seen, the process of continuous policy balancing by Congress has included the provision over the years of numerous exceptions and special privileges to government agencies analogous to the special treatment sought here by the FCC. As we have also seen, that process has specifically included unsuccessful efforts by the FCC to obtain for itself the very privilege – exemption from § 525 – it now asks this Court to confer broadly on all government agencies. If and when Congress deems it necessary for the FCC or other agencies to have such power, Congress will provide it. This Court should adhere to its well-established practice of leaving such policy decisions to Congress.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

WALTER DELLINGER
(*Counsel of Record*)
JONATHAN D. HACKER
JEREMY MALTBY
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Attorneys for Amici Curiae

Nos. 01-653, 01-657

Supreme Court, U.S.
FILED
JUN 21 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

RECEIVED
JUN 21 2002
937967

ARCTIC SLOPE REGIONAL CORP., *et al.*,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* URBAN COMM-NORTH CAROLINA, INC., KANSAS PERSONAL COMMUNICATIONS SERVICES, LTD., AND BERTHA COFFIN IN SUPPORT OF RESPONDENTS

CHARLES J. COOPER
Counsel of Record
DAVID H. THOMPSON
MATTHEW D. MCGILL
COOPER & KIRK, PLLC
Suite 200
1500 K Street, N.W.
Washington, D.C. 20005
(202) 220-9600
Counsel for Amicus Curiae Urban Comm-North Carolina, Inc.

June 21, 2002

(Additional Counsel listed on inside cover)

BEST AVAILABLE COPY

PREBEN JENSEN
CHARLES E. SIMPSON
DELTON VANDEVER
WINDELS MARX LANE
AND MITTENDORF, LLP
156 West 56th Street
New York, NY 10019
(212) 237-1000
Counsel for Amicus Curiae Urban Comm-North Carolina, Inc.

BENJAMIN F. MANN
NANCY S. JOCHENS
BLACKWELL SANDERS PEPER
MARTIN LLP
Suite 1000
2300 Main Street
Kansas City, MO 64108
(816) 983-8000
Counsel for Amici Curiae Kansas Personal Communication Services, Ltd. and Bertha Coffin

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	7
I. The FCC Has Failed To Fulfill Its Mandate To Ensure That Small Businesses Receive PCS Licenses	7
II. The FCC's Proffered "Regulatory" Justification For Canceling NextWave's Licenses Is Belied Both By Its Own Regulations And By Its Actions Throughout The NextWave Litigation	18
A. The FCC Has Pursued Only Its Financial Interests Throughout Its Dealings With The C Block Licensees	20
B. The FCC's Actions Correlate To The Value Of Spectrum And Belie Its Proffered "Regulatory" Objectives	22
III. The FCC's Proffered "Regulatory" Justification For Canceling C Block Licenses Is At War With The Defining Regulatory Feature Of The C Block Auction	27
CONCLUSION	30

TABLE OF AUTHORITIES – Continued

Page

CASES

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) 10

United States v. Winstar Corp., 518 U.S. 839 (1996) 28

STATUTES, RULES AND REGULATIONS

11 U.S.C. § 525 ..... 4, 15, 18

47 U.S.C. § 309(i) 19

47 U.S.C. § 309(j)(1) 7

47 U.S.C. § 309 (j)(3)(B) 8, 23

47 U.S.C. § 309(j)(4)(A) 8

47 U.S.C. § 309(j)(7)(A) 24

47 C.F.R. § 1.2109(e) (2000) 20

47 C.F.R. § 1.2110 (1995) 9, 12

47 C.F.R. § 24.704(a)(1)-(2) (1995) 21

47 C.F.R. § 24.709 (1995) 9

47 C.F.R. § 24.709(a)(1) (1995) 9, 12

47 C.F.R. § 24.709(b) (2000) 25

47 C.F.R. § 24.711(b) (1995) 12

47 C.F.R. § 24.712(a) (1995) 13

47 C.F.R. § 24.720(b)(1) (1995) 13

TABLE OF AUTHORITIES – Continued

Page

OTHER

FCC Auction 5: Broadband PCS, Fact Sheet, available at http://wireless.fcc.gov/auctions/05/factsheet.html (last updated May 28, 2002) 13

FCC Public Notice (PNWL 95-28), *Commercial Mobile Radio Service Information: Announcing The Winning Bidders In The FCC's Auction of 99 Licenses To Provide Broadband PCS In Major Trading Areas: Down Payments Due March 20, 1995* (Mar. 13, 1995) 10

FCC Public Notice (PNWL 95-88), *FCC Postpones Short-Form Filing Date for 493 BTA Licenses Located in the C Block for Personal Communications Services in the 2 GHz Band* (July 27, 1995) 10

FCC Public Notice (DA 96-716), *Entrepreneurs' C Block Auction Closes*, 1996 WL 239442 (May 8, 1996) 1

FCC Public Notice, (DA 96-1153), *Entrepreneurs' C Block Reauction Closes*, 11 F.C.C.R. 8183 (July 17, 1996) 1

FCC Public Notice (DA 97-81), *D, E and F Block Auction Closes*, 1997 WL 20711 (Jan. 15, 1997) 14

FCC Public Notice (DA 98-547), *Commission Staff Requests Submission of Superior Alternatives to Proposed Agreement to Resolve Pocket Communications Bankruptcy*, 13 F.C.C.R. 6754 (Mar. 23, 1998) 17

FCC Public Notice (DA 98-1168), *Wireless Telecommunications Bureau Announces Broadband Personal Communications Services C Block Elections*, 13 F.C.C.R. 16,705 (June 16, 1998) 6

TABLE OF AUTHORITIES – Continued

Page

FCC Public Notice (DA 99-757), *C, D, E and F Block Broadband PCS License Auction Closes*, 14 F.C.C.R. 668 (Apr. 20, 1999).....24

FCC Public Notice (DA 00-2038), *C and F Block Broadband PCS Spectrum Auction Schedule for November 29, 2000 Rescheduled for December 12, 2000*, 15 F.C.C.R. 17,251 (Sept. 6, 2000) 25

FCC Public Notice (DA 01-211), *C and F Broadband PCS Auction Closes* (Jan. 24, 2001).....26

FCC Press Release, *FCC Hits $20 Billion Mark in Total Auction Revenues*, 1996 WL 159208 (Apr. 15, 1996).....14

In re Implementation of Section 309(j) of the Communications Act, 10 F.C.C.R. 403 (1994).....8, 9

In the Matter of the Commissions Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licenses, Second Report and Order and Notice of Further Rulemaking, 12 F.C.C.R. 16,436 (Oct. 16, 1997).....16

In re the Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees: On Reconsideration of the Second Report and Order, 13 F.C.C.R. 8345 (Mar. 24, 1998).....17, 23

In re the Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses: On Reconsideration of the Second Report and Order, 13 F.C.C.R. 15,743 (Aug. 19, 1998).....25

TABLE OF AUTHORITIES – Continued

Page

In re the Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses: Sixth Report and Order on Reconsideration, 15 F.C.C.R. 16,266 (Aug. 29, 2000).....18, 25

In re Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses NextWave Personal Communications, Inc., and NextWave Power Partners, Inc., Petition for Reconsideration, 15 F.C.C.R. 17,500 (Sept. 6, 2000).....26

The Settlement Between the U.S. Government and NextWave Telecom Inc. to Resolve Disputed Spectrum Licenses: Hearing Before the Subcomm. On Telecommunications and the Internet of the House Comm. on Energy and Commerce, 107th Cong. 24 (2001) (statement of Rep. Billy Tauzin) 15

INTEREST OF THE *AMICI CURIAE*[1]

Amici Urban Comm-North Carolina, Inc. ("Urban Comm") and Kansas Personal Communications Services, Ltd. ("KPCS") were among the 90 entities that were awarded PCS licenses as a result of their successful bids in the original C block auctions in 1996.[2] *Amicus* Bertha Coffin is the majority stockholder and principal creditor to KPCS. Both Urban and KPCS qualified as "small businesses" under the Federal Communications Commission ("FCC") eligibility requirements for participation in the C block auctions. Urban Comm is minority-owned, while KPCS is female-owned. As such, they are just the type of small businesses that Congress sought to provide opportunities to participate in the wireless market. Both Urban Comm and KPCS filed for bankruptcy protection when they were temporarily unable to fulfill their debt payments under the promissory notes they signed to obtain their licenses. Various provisions of the Bankruptcy Code notwithstanding, the FCC cancelled *amici*'s licenses.

---

[1] This brief has been financed by the *amici* with support from Gabriel Capital, L.P., which is a creditor of *amicus* Urban Comm. No counsel for any party authored this brief in whole or in part. Counsel of record for all parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

[2] Eighty-nine entities submitted winning bids in the first auction of C block licenses in March 1996. However, two of those bidders, who had won 18 licenses, could not produce the required down payment. FCC Public Notice (DA 96-716), *Entrepreneurs' C Block Auction Closes*, 1996 WL 239442, Attachment A (May 8, 1996) ("C Block Auction Results"). The FCC re-auctioned those 18 licenses in July 1996 to seven winning bidders, three of whom had not won licenses in the first C block auction. FCC Public Notice (DA 96-1153), *Entrepreneurs' C Block Reauction Closes*, 11 F.C.C.R. 8183 (July 17, 1996). So, while there were 92 winning bidders in the 1996 C block auctions, only 90 ever obtained C block licenses.

Amici are thus in a position similar to that of respondent NextWave Personal Communications Inc. ("NextWave").[3] All three C block licensees are now ready to emerge from bankruptcy upon confirmation of their respective reorganization plans. This Court's affirmance of the D.C. Circuit's opinion, which rejected the FCC's cancellation of NextWave's licenses, will allow them all to do so and finally to bring their licenses into service.

INTRODUCTION AND SUMMARY OF ARGUMENT

Electromagnetic spectrum is a scarce and valuable asset, and its price obeys the law of supply and demand and other market forces. Congress sought to capitalize on this reality in 1993 when it determined to allocate spectrum through a process of competitive bidding. The market value of spectrum can be determined both directly, through sales of spectrum licenses by the FCC, and indirectly, through the market capitalization of companies whose businesses depend on such licenses. And if one tracks the market value of the broadband PCS spectrum against the FCC's conduct with respect to the C block licenses, one finds that the FCC – from its design of the auction itself to its position before this Court – has pursued a singular interest: to maximize its revenue from the sale, and resale, of spectrum.

Throughout the tortuous history of this case, the FCC's positions have been governed by, and have therefore

[3] While *amici* endorse the legal arguments advanced by NextWave, *amici* note that, even if the Court were to conclude that the FCC could cancel NextWave's licenses, such a determination would not necessarily be binding on *amici*, considering their quite different factual circumstances.

fluctuated with, the market value of spectrum. For example, the FCC designed the C block auction to obtain the highest possible bid prices, and employed standard instruments (*e.g.*, promissory notes, UCC financing statements) to protect its interests as a purchase-money creditor. And in the bankruptcy proceedings involving NextWave and other C block licensees, the FCC participated vigorously when it was undersecured (*i.e.*, the value of its claim exceeded the value of its collateral). It vigorously resisted any effort by bankrupt C block debtors to reduce the size of the FCC's claims and attempted to force favorable settlements, including one requiring transfer of the C block licenses reserved for small businesses to a major wireless carrier that had twice been barred from bidding on the C block licenses. But when the FCC became oversecured due to a sharp increase in the value of spectrum, it unilaterally exited the bankruptcy proceedings. It declared that the licenses had cancelled automatically as of October 1998, thereby mooting, on the eve of their confirmation, reorganization plans that provided for full, lump-sum payment of the debts, and rushed the licenses back to auction, all to realize for itself the three-fold increase in the value of spectrum over the prices obtained in the original C block auction.

We hasten to make clear that there is nothing wrong with the FCC becoming a creditor to winning C block bidders, nor in the FCC pursuing its financial interests as creditor in litigation with C block licensees. Indeed, licensees' positions in this case have also fluctuated with the value of spectrum, as dramatically illustrated by Verizon's recent voluntary dismissal of its *certiorari* petition in response to the significant decline in the value of spectrum since the FCC's reauction of NextWave's and Urban Comm's licenses. *See* FCC Br. 12 n.6.

What is wrong, however, is the FCC's disingenuous claim that its actions in this matter, particularly its cancellation of C block licenses for failure to make full and timely payment, were not "motivated solely or even primarily by fiscal concern." FCC Br. 37. According to the FCC, its purpose in conditioning C block licenses on full and timely payment of the licensees' installment obligations was not simply to secure the debt, in the manner of a typical, financially motivated commercial creditor. Rather, the FCC says that it sought primarily to protect its "regulatory interest" in ensuring that spectrum licenses are held by "the applicant[s] most likely to advance the public interest through efficient use of the spectrum." FCC Br. 17. "Failure to make timely payments," argues the FCC, "belies the regulatory implication of the [licensee's] original high bid, namely that the applicant will make the most efficient use of the spectrum." *Id.* at 24; *see also id.* at 15, 17-19, 36-40. Such a failure to pay thus "indicates that the spectrum was not optimally licensed and therefore triggers cancellation and prompt reallocation." *Id.* at 15.

The FCC's alleged regulatory justification for canceling NextWave's licenses is a transparent pretext, born of the agency's desire to stand apart from, and above, the other commercial creditors in NextWave's bankruptcy proceeding. Specifically, the FCC seeks to escape the grasp of 11 U.S.C. § 525, which flatly prohibits a government agency from revoking a license "solely because" the licensee is a debtor in bankruptcy and "has not paid a debt that is dischargeable" under the Bankruptcy Code. Although the FCC's cancellation of NextWave's licenses was admittedly triggered solely by NextWave's failure to make payments on its installment debt, the FCC argues that its alleged regulatory justification for the cancellation

precludes application of section 525, which it says reaches only license cancellations for strictly financial reasons.

As the D.C. Circuit held below, "section 525 prevents the Commission, *whatever its motive*, from canceling the licenses of winning bidders who fail to make timely installment payments while in Chapter 11." Pet. App. 49a (emphasis added). But even if the FCC's motive for canceling a license is determinative, the agency still loses this case, for its consistent, financially motivated *actions* as a commercial creditor speak louder than, and belie, its *words* claiming to be a public-spirited, neutral regulator.

Nor can the FCC's alleged "regulatory purpose" for canceling C block licenses be squared with the defining regulatory feature of the C block auction. In keeping with Congress's mandate to open the highly concentrated wireless industry to competition from start-up companies and small businesses, eligibility to participate in the C block auction was restricted to applicants with assets and revenues below prescribed limits. To enable such small businesses to participate in the auction, the FCC agreed to finance up to 90 percent of the purchase price through installment payments. The governing premise of the C block auctions was that *all* 92 winning bidders would have to fulfill their installment payment obligations by leveraging their licenses in the capital markets. Accordingly, it was equally obvious that *all* winning C block bidders were uniquely vulnerable to a decline in the value of spectrum. And when the value of spectrum declined dramatically in the months following the C block auction, *all* of the C block licensees were denied further access to the capital markets, and virtually *none* of them were able to make their installment payments to the FCC on a timely basis.

When the C block licensees approached the FCC *en masse* for relief from their installment payment obligations, the FCC recognized the generic, across-the-board nature of the problem by initially suspending all C block installment payments and then proposing four "restructuring" options, none of which offered relief from full and timely payment of the installment obligations. Confronted with an inability to raise capital to meet their license payment obligations, most of the C block licensees simply forfeited their down payments and folded their tents, while a few of these small businesses, including *amici* and NextWave, continued with their efforts to raise financing, build out the network with available capital and then eventually sought the breathing room afforded by the bankruptcy laws to give them time to fulfill their business plans.

Against this background, the FCC justifies its insistence on full and timely payment of C block installment obligations on the "regulatory" rationale that a winning "bidder's failure to make payment in a timely fashion is fatal to its implicit representation that it is the 'best' of the potential licensees" that competed in the auction. FCC Br. 37. But here virtually *none* of the C block licensees were able to make full and timely installment payments, due to economic reasons that were endemic to them as a class.[4]

[4] When the FCC resumed installment payments, only a handful of the 90 licensees elected to resume installment payments on all of their licenses. *See* FCC Public Notice (DA 98-1168), *Wireless Telecommunications Bureau Announces Broadband Personal Communications Services C Block Elections,* 13 F.C.C.R. 16,705 (June 16, 1998). Eventually, all of them either (1) transferred their licenses to another (frequently larger and better capitalized) entity; (2) ceased operations and surrendered their licenses; or (3) sought bankruptcy protection.

The very financial restrictions that qualified them to participate in the C block auction in the first place effectively guaranteed their inability to fulfill their license payment obligations in the face of a precipitous decline in spectrum value. And it is patently absurd for the FCC to suggest that other "potential licensees" among the qualified small business bidders would have been better able under the circumstances to fulfill the terms of their bids and to make prompt and efficient use of the spectrum. The only entities that plausibly might have done so were the very telecommunications giants that were explicitly barred from participation in the C block auction.

Indeed, the FCC's reauction of the C block spectrum resulted, ironically, in the redistribution of the licenses largely to those same telecommunications giants and to companies controlled by them. Thus, the FCC's actions at issue here, if upheld, will bring about the perverse result that a genuine "regulatory" interest mandated by Congress – entry of small businesses into the industry – will be sacrificed in favor of a bogus "regulatory" interest asserted by the FCC to escape its status as a creditor under the Bankruptcy Code.

ARGUMENT

I. The FCC Has Failed To Fulfill Its Mandate To Ensure That Small Businesses Receive PCS Licenses.

In 1993, Congress decided to chart a new course for the allocation of the nation's electromagnetic spectrum. Previously, the FCC had allocated spectrum first through a completely subjective application process and later through lotteries. In 47 U.S.C. § 309(j)(1), Congress directed the FCC to allocate spectrum "through a system

of competitive bidding." While auctioning spectrum to the highest bidder promised to generate significant revenue for the public fisc, Congress clearly harbored concerns that such a regime would pose insuperable barriers to start-ups and other small businesses. The new auction process thus threatened to further entrench established telecommunications conglomerates at the expense of the competition and innovation that entrepreneurial small businesses could bring to the wireless industry.

To stave off this eventuality, Congress directed the FCC to "promot[e] economic opportunity and competition and [to] ensur[e] that new and innovative technologies are readily accessible to the American people by . . . disseminating licenses among a wide variety of applicants, including small businesses [and] rural telephone companies." 47 U.S.C. § 309(j)(3)(B). In furtherance of this end, Congress mandated that the FCC consider "alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments." *Id.* § 309(j)(4)(A). After months of hearings and public comment the FCC issued its procedures for the auction of spectrum for wireless broadband personal communications services, commonly referred to as the broadband PCS spectrum. *In re Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 10 F.C.C.R. 403, ¶ 1 (Nov. 23, 1994) ("*Implementation of Section 309(j)*").

The broadband PCS spectrum consists of 120 MHz of electromagnetic spectrum. The FCC divided this 120 MHz of spectrum into six blocks: three blocks of 30 MHz (A, B, and C) and three blocks of 10 MHz (D, E and F). Following Congress's mandate, the FCC set aside the 30 MHz "C block" and the 10 MHz "F block" for auction to small

businesses, so-called "designated entities." 47 C.F.R. §§ 1.2110 & 24.709(a)(1) (1995). To qualify as a designated entity, an auction participant had to come within certain asset and revenue limits and ownership restrictions. *See Implementation of Section 309(j)* ¶ 12; 47 C.F.R. § 24.709 (1995). The FCC allowed successful C block bidders to pay their bid price in installment payments spread over ten years with interest-only payments for the first six years. *Implementation of Section 309(j)* ¶ 16.

Although the FCC had set aside spectrum for auction to small businesses, the design of its auction process actually operated against Congress's intentions to increase competition and provide economic opportunity for these small businesses. The FCC's first major misstep was its decision to auction the unrestricted A and B blocks before the C block. As the A and B blocks were each 30 MHz, this first auction distributed fully one half of the available broadband PCS spectrum. Although there were few restrictions on the qualifications of bidders, as a practical matter, this auction was open only to telecommunications giants with ready access to the public debt and equity markets. There are two main reasons for this: First, the licenses in the A and B blocks covered regional "major trading areas" ("MTAs"), as opposed to the licenses for smaller "basic trading areas" ("BTAs") (several of which might be contained in a single MTA). Few small businesses were prepared to bid on licenses for such large swaths of territory. Second, and more importantly, winning bids (for these enormous MTAs) had to be paid in full at the conclusion of the auction, which effectively precluded participation by small businesses.

The A and B block auction drew only 30 bidders, 18 of which walked away with licenses.[5] FCC Public Notice (PNWL 95-28), *Commercial Mobile Radio Service Information: Announcing The Winning Bidders In The FCC's Auction of 99 Licenses To Provide Broadband PCS In Major Trading Areas: Down Payments Due March 20, 1995*, Attachment A (Mar. 13, 1995) ("A and B Block Auction Results"). Because the A and B blocks had been auctioned first, C block bidders (or at least those that hoped to compete with the entrenched telecommunications powers) faced two serious challenges.

First, the established wireless communications players now enjoyed an enormous head start in building out networks and rolling out broadband PCS service. This "first mover" advantage added to the already enormous advantages established wireless companies enjoyed from their access to capital markets, their name recognition, and their pre-existing customer base. These significant market advantages were compounded when the FCC further delayed the C block auction in order to rewrite its "designated entity" regulations to comply with this Court's ruling in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). FCC Public Notice (PNWL 95-88), *FCC Postpones Short-Form Filing Date for 493 BTA Licenses Located in the C Block for Personal Communications Services in the 2 GHz Band* (July 27, 1995). Second, after the A and B block auction allocated one half of all the broadband PCS spectrum, only one block of 30 MHz licenses remained. A fledgling carrier with only a 10 MHz license could never hope to compete effectively with the established wireless

[5] If one excludes the three MTAs for which there was the least demand, Alaska, Guam and the Northern Marinara Islands, and American Samoa, the number of winning bidders shrinks to 13.

powers in a major metropolitan area, for that amount of spectrum would be inadequate to support the customer traffic. Both of these challenges counseled that if new entrants entertained any hope of competing with the established wireless companies, it was critical that they obtain 30 MHz C block licenses. And, in any event, a new entrant dared not wait for the FCC to bring the F block licenses to market while the A and B block licensees grabbed even more market share.

Predictably, as a result of these competitive forces and the limited supply of 30 MHz PCS spectrum in the C block auction, the price increased. The C block auction finally began in December 1995, more than nine months after the close of the auction of the A and B blocks. Two hundred fifty-five small businesses qualified as "designated entities" and entered the auction, competing for 493 licenses, one for each BTA in America. When the bidding stopped in May 1996, 89 designated entities had submitted winning bids totaling $10.1 billion with an average spectrum price of $1.33/MHz/POP.[6] *See* C Block Auction Results. These bids reflected a steep increase in price (161%) over the amounts paid for equivalent licenses in the A and B blocks. A and B Block Auction Results (average price of $0.51/MHz/POP). *See* The increased price reflected both

[6] Price per megahertz per population is the standard measuring unit for the value of electromagnetic spectrum licenses. By controlling for licenses' differing breadth of spectrum and size of population served, $/MHz/POP unit allows one to compare different electromagnetic spectrum license transactions. The unit is equal to the price of the license (or licenses) divided by the breadth of the license in number of megahertz, divided by the population served by the license. By way of comparison to the C block auction, the auction of the A and B block licenses yielded only $0.52/MHz/POP. *See* A and B Block Auction Results, Attachment A.

the competitive forces identified above but also an overall upswing in the market's valuation of spectrum during the fourteen-month gap between the close of the first auctions and the end of the C block auction.[7] Thus, the FCC's delay in bringing the C block spectrum to market contributed to the increased prices.

Each successful bidder in the C block was required to submit down payments totaling 10 percent of the net bid (the bid minus any applicable bidding credit) in order to obtain its license. The FCC financed the remaining 90 percent of the bid price with a ten-year loan (with interest-only payments for the first six years) secured by a first lien on the PCS license. 47 C.F.R. § 24.711(b) (1995). In order to obtain its PCS license, each successful C block bidder had to execute a promissory note for the amount of the loan, Pet. App. 389, and the FCC filed UCC financing statements recording its lien on the PCS license.

As referenced above, only "designated entities" were eligible to participate in the C block auction. 47 C.F.R. §§ 1.2110 & 24.709(a)(1) (1995). To qualify as a "designated entity," the bidder (together with any affiliates) could not exceed $500 million in total assets or $125 million in gross revenues in each of the last two years. *Id.* However, the FCC's most generous 25 percent bidding credits were available only to a designated entity that also qualified as

[7] From the close of the auction of the A and B blocks in March 1995 to the close of the C block auction in May 1996, the price of PCS stocks rose an average of 18.8%. *See* PCS Index, *infra* at App. 1a. The PCS Index is a market capitalization-weighted index of publicly traded stocks in the PCS industry. More information concerning the methodology of the PCS Index is included *infra* at App. 2a-6a.

a "small business," meaning it has less than $40 million in gross revenues. 47 C.F.R. § 24.720(b)(1) (1995); *id.* § 24.712(a) (creates bidding credit of 25 percent). Of the 255 designated entities that participated in the C block auction, 253 qualified for the bidding credit available to small businesses.[8]

Amici Urban Comm and KPCS are paradigm illustrations of the C block licensees. Urban Comm was formed by a group of minority businessmen who sought to bring PCS service to traditionally underserved areas of the South. Urban Comm submitted winning bids on 23 C and F block licenses in Virginia, North Carolina, and South Carolina for a total bid price of $86.3 million. Kansan Bertha Coffin saw the C block auction as an opportunity to leverage her experience in operating the Council Grove Telephone Co. (left to her by her husband upon his death in 1978). She formed KPCS to bid on licenses in the C block auction, eventually winning three licenses in Kansas for $9.7 million. Both Urban Comm and KPCS quickly obtained financing to make their 10 percent down payments, but after the collapse of the spectrum market in 1997, the capital markets closed to C block licensees and they, like NextWave, were soon forced into bankruptcy.

Wireless communications is a capital-intensive industry. Once a carrier acquires licenses, it must spend hundreds of millions, if not billions, of dollars to build out its network before it ever sees revenue from customers. By mandating that C block bidders have assets of less than

[8] *FCC Auction 5: Broadband PCS, Fact Sheet*, available at http://wireless.fcc.gov/auctions/05/factsheet.html (last updated May 28, 2002).

$500 million and annual revenues of less than $40 million, the FCC ensured that each C block licensee would be required to access the capital markets in order make its installment payments on its licenses and to build out its network. Given the length of time it takes to build out a PCS network and the asset and revenue limitations on eligible C block licensees, the ability to raise funds in the capital markets was essential to the survival not only of C block licensees but also of the FCC installment payment regime.

The FCC's subsequent actions greatly contributed to the difficulties of the C block licensees in raising the capital necessary to make the looming installment payments. On April 5, 1996, as the C block auction was nearing its conclusion, the FCC announced its "plans to auction the spectrum for the [PCS] D, E and F blocks." FCC Press Release, *FCC Hits $20 Billion Mark in Total Auction Revenues*, 1996 WL 159208 (Apr. 15, 1996). The FCC subsequently opened the auction for the D, E and F blocks – *all* the remaining broadband PCS spectrum – in August 1996, less than four months after the C block auction closed and before many successful C block bidders, including NextWave and Urban Comm, had obtained their C block licenses which was a prerequisite to their business plans.

The spectrum market, which had already declined significantly since the C block auction,[9] reacted predictably to this sudden increase of PCS spectrum supply. The price of spectrum collapsed. In this auction of the D, E, and F blocks, the FCC could muster only $0.33/MHz/POP (as compared to $1.33 in the May 1996 C block auction). FCC

[9] From the close of the C block auction (May 6, 1996) to the start of the auction of the D, E, and F blocks, the price of PCS equities fell 8.3%. App. 1a.

Public Notice (DA 97-81), *D, E and F Block Auction Closes*, 1997 WL 20711 (Jan. 15, 1997) ("D, E, & F Block Auction Results"). The flood of supply overwhelmed demand even for major metropolitan markets. In New York City, the D, E, and F blocks sold at an average price of $0.34/MHz/POP, whereas the C block had sold for $1.84/MHz/POP just four months earlier. In Los Angeles, what had sold for $1.52/MHz/POP in May was, suddenly, worth no more than $0.17/MHz/POP four months later. *Compare* C Block Auction Results *with* D, E, and F Block Auction Results.

This precipitous drop in the value of spectrum immediately cooled the interest of the capital markets in PCS license holders.[10] The start of the D, E, and F block auction signaled a precipitous decline in the equity values of publicly traded PCS stocks, shedding 32 percent of their value over the next seven months. App. 1a. Of course the publicly traded PCS stocks were largely A and B block

[10] In a recent hearing of the House Subcommittee on Telecommunications and the Internet, Rep. Billy Tauzin made the point succinctly:

> [T]he speed with which Congress and the FCC went out and auctioned additional spectrum had several deleterious effects upon the C-Block auctions. First of all, it diminished the value of those licenses as we put more spectrum out into the public domain, and therefore made each bid on spectrum less valuable. Second, it may have severely undercut the capacity of groups like NextWave to go out and do their financing as the value of their asset, the spectrum they had bid in, [may] have been diminished by the government action.

The Settlement Between the U.S. Government and NextWave Telecom Inc. to Resolve Disputed Spectrum Licenses: Hearing Before the Subcomm. on Telecommunications and the Internet of the House Comm. on Energy and Commerce, 107th Cong. 24 (2001) (statement of Rep. Billy Tauzin).

licensees, who on average paid only a multiple of 1.54 times over D, E, and F block values. C block bidders, on average, paid a multiple of 4.03 times D, E, and F block values. *Compare* A and B Block Auction Results *with* C Block Auction Results *with* D, E, and F Block Auction Results. The survival of the winning C block bidders had always, by the FCC's design, depended upon their ability to leverage their licenses in the capital markets. The C block licensees now found the capital markets closed to them, spooked by the glut of PCS spectrum and the resulting apparent overvaluation of the same by C block bidders. *See* JA 315.

After the D, E, and F block auction, C block licensees found themselves in a bind. The capital markets were closed, available cash had largely been spent to meet the FCC's aggressive network build-out requirements, and, as designated entities, they had no significant sources of revenue that could generate sufficient cash to weather the spectrum valuation storm. It did not take long for C block licensees to become insolvent. Pocket Communications, the second largest C block licensee, fell first, on March 31, 1997.

In the face of these market realities, the FCC blithely acknowledged that C block licensees were experiencing "a range of apparent difficulties in accessing the capital markets." *In the Matter of the Commissions Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licenses, Second Report and Order and Notice of Further Rulemaking*, 12 F.C.C.R. 16,436, ¶ 11 (Oct. 16, 1997). As a solution, the FCC offered licensees a menu of four "restructuring" options, none of which offered relief from full payment of the underlying debt obligations. If the licensees did not resume full

payments, they would be forced to forfeit at least 30 percent of their down payments on surrendered licenses. *See In re the Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees: On Reconsideration of the Second Report and Order*, 13 F.C.C.R. 8345, ¶¶ 21-60 (Mar. 24, 1998) (*"Reconsideration of the Second Report and Order"*).

Even as C block licensees, including NextWave and *amici* Urban Comm and KPCS, were scouring the capital markets for funding in order to stave off bankruptcy, the FCC's regulatory positions concerning C block installment payments exacerbated the already difficult situation. For example in March 1998, as C block licensees were seeking to finance one of the restructuring options, the FCC proposed a settlement in the Pocket Communications bankruptcy, whereby the creditors would take Pocket's licenses in the valuable Chicago and Dallas MTAs at forty cents on the dollar. This deal imputed a value of $0.72/MHz/POP in these major urban centers – far less than most C block licensees were going to pay under the FCC restructuring. FCC Public Notice (DA 98-547), *Commission Staff Requests Submission of Superior Alternatives to Proposed Agreement to Resolve Pocket Communications Bankruptcy*, 13 F.C.C.R. 6754 (Mar. 23, 1998). Not surprisingly, C block financing sources backed out of many pending deals.

After NextWave's public and private financing efforts did not materialize, and with a large number of creditors filing for attachment of NextWave's assets, NextWave filed a Chapter 11 bankruptcy petition in June of 1998, setting the stage for this case. *Amicus* Urban Comm followed NextWave into bankruptcy in October 1998; KPCS was

involuntarily forced into bankruptcy by its creditors in July 1999. Eventually, virtually every other C block licensee simply walked away or sold out to better-capitalized players, forced to abandon their efforts to make use of the licenses that they had bid on successfully. *See supra* at 6 & n.4.

In the aftermath of the C block debacle, the FCC now seeks to wrest control of the few licenses that remain in the hands of small businesses. Specifically, in direct contravention with its congressional mandate, the FCC relaxed its eligibility rules and permitted companies controlled by the largest wireless carriers, including Verizon, Cingular and AT&T Wireless, to purchase licenses once reserved for entrepreneurs in a reauction of the spectrum. *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses: Sixth Report and Order on Reconsideration*, 15 F.C.C.R. 16,266, ¶¶ 17-19 (Aug. 29, 2000) ("*Sixth Report and Order on Reconsideration*").

II. The FCC's Proffered "Regulatory" Justification For Canceling NextWave's Licenses Is Belied Both By Its Own Regulations And By Its Actions Throughout The NextWave Litigation.

Under the straightforward dictates of section 525 of the Bankruptcy Code, the FCC is barred from canceling NextWave's licenses "solely because" of nonpayment of NextWave's debt obligations under the license. Thus, as discussed *supra* at 4, the FCC claims that it was not "motivated solely or even primarily by fiscal concerns." FCC Br. 37. According to the FCC, even though nonpayment of the debt obligations was the direct, proximate, and

exclusive cause of the cancellation of the licenses, section 525 does not stand as a barrier to this action because the act of nonpayment itself has "regulatory" implications.

The FCC maintains that the C block licenses were awarded to the highest bidder on the assumption that the willingness to pay the most for the license demonstrated that such bidders were in the best position to utilize the spectrum promptly and efficiently. Failure to make full and timely payment "indicates that the applicant, despite its bid, is 'not the applicant most likely to use the [l]icenses efficiently' in the public interest." FCC Br. 19 (quoting Pet. App. 109a, 234a); *see also* FCC Br. 37 ("Because the bid is the central regulatory mechanism used to identify the 'best' licensee from among competing applicants, the bidder's failure to make payment in a timely fashion is fatal to its implicit representation that it is the 'best' of the potential licensees."). Thus, "cancellation occurs primarily because of the licensee's noncompliance with license conditions, which demonstrates that it is *not* the applicant that will best use the license in the public interest." FCC Br. 21-22 (emphasis in original).

The FCC's course of conduct throughout the history of the C block licenses, however, thoroughly belies its claimed "regulatory" justification. From the inception of the auction process through the most recent reauctioning of the C block licenses, the FCC's actions have been driven by its desire to maximize its revenue from the sale, and resale, of the C block spectrum. The FCC's positions correlate precisely to the value of spectrum at any given time. And just as these values have fluctuated sharply over the last several years, so too has the FCC's position on the appropriate fate of the licenses in question. As the discussion below demonstrates, the FCC's positions make

sense only as a function of its single-minded pursuit of its financial interests, to the exclusion of its genuine regulatory interest in fostering competition in the wireless industry by new entrants and small businesses. And this record leaves no doubt that the licenses were cancelled and reauctioned for one, and only one, reason: the FCC's desire to realize for itself a sharp increase in the value of spectrum over the amount fetched in the original auction.

A. The FCC Has Pursued Only Its Financial Interests Throughout Its Dealings With The C Block Licensees.

Throughout its dealings with the C block licensees, the FCC has pursued its financial interests in generating revenue from the auction process. The very rules governing the awarding of licenses made clear that maximization of revenue was the top priority: the FCC promulgated regulations mandating that the C block licenses be distributed to the highest eligible bidder, 47 C.F.R. § 1.2109(e) (2000) ("Licenses *will be* awarded upon the full and timely payment of winning bids") (emphasis added), and allowed licensees 10 years to pay for their licenses. The FCC's rules thus deprived the FCC of the ability to judge the prospective licensees on any criterion other than the ability to generate the most revenue for the Treasury. It did *not* condition license grants on specified build-out targets, periodic checks of financial health, or other evidence that winning bidders fulfill the regulatory interest in efficient use of the spectrum. Rather, the FCC trumpets the fact that it uses a bidder's willingness to pay more as a proxy for this sort of basic due diligence. FCC Br. 49 (labeling such criteria "marginal qualifications" as compared to its own). Thus, the payment of the installment

debts incurred by licensees, and nothing more, was the touchstone of the FCC's policy.

With this financial motivation firmly established, the FCC employed standard credit instruments to protect the agency's interests. Specifically, the FCC required C block licensees to sign promissory notes with mandatory payment schedules, and conditioned the licenses on full and timely payments. The terms of the note made clear that the C block licensees would be liable for the full amount of the outstanding debt obligations: "Upon a default under this Note, the unpaid Principal Amount, plus all unpaid interest accrued thereon, together with any late fee and/or administrative charge . . . shall become immediately due and payable." Pet. App. 392. The pertinent regulations also reflected the fact that the FCC would hold a defaulting licensee responsible for the full amount of any losses attributable to a breach, as well as a "penalty" of liquidated damages. 47 C.F.R. § 24.704(a)(1)-(2) (1995) (defaulting bidder is "subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission" . . . "plus an additional penalty equal to three (3) percent of the winning bid."). Additionally, the FCC required security agreements to be executed, and filed UCC financing statements to secure a first lien on the licenses.[11]

[11] In fact, when the C block licensees, desperate for financing, implored the FCC to give up its first lien on the licenses, the FCC refused. The FCC thus deprived the C block licensees of their ability to leverage their only significant asset.

B. The FCC's Actions Correlate To The Value Of Spectrum And Belie Its Proffered "Regulatory" Objectives.

When it became clear that the C block licensees would not be able to make their debt payments and that some would seek bankruptcy protection, the FCC sought to further its pecuniary interests by calibrating its conduct with the market value of spectrum. And contrary to the FCC's arguments, this course of conduct did not advance its regulatory objectives, but rather, it was frequently at war with the FCC's congressional mandate to distribute licenses to new entrants in the industry.

When NextWave filed for bankruptcy protection in June 1998, there had not been a PCS spectrum auction since the disastrous D, E, and F block auction in January 1997 that netted only $0.33/MHz/POP. In March of 1998, in its proposed settlement in the Pocket Communications bankruptcy, the FCC was willing to accept $0.72/MHz/POP, 40 cents on the dollar, for licenses in the Chicago and Dallas MTAs. Even $0.72/MHz/POP, however, was a great deal less than the $1.53/MHz/POP NextWave had bid for its C block licenses. So it is not surprising that rather than immediately seek a settlement, the FCC filed its claim in bankruptcy for $4.77 billion (plus attorneys' fees), JA 34, vigorously opposed NextWave's adversary fraudulent transfer proceeding, and hoped for a better offer.

That all changed in May of 1999 when the bankruptcy court ruled that NextWave's purchase of C block licenses was a fraudulent transfer. Pet. App. 357a-358a. The next month, the bankruptcy court confirmed its remedy, setting aside $3.7 billion of NextWave's bid price of $4.7 billion. *Id.* at 273a-274a. That decision reduced the price basis of

NextWave's C block licenses by 78 percent – from $1.53/MHz/POP to $0.33/MHz/POP.

Leveraging its status as the largest creditor in the bankruptcy case, the FCC promptly attempted to force the sale of all of NextWave's licenses to a major carrier, Nextel, for approximately $2.1 billion. Under the settlement, Nextel would pay $1.6 billion in cash to the FCC, and the FCC would retain the nearly $500 million that NextWave had paid to the FCC as down payments required to obtain the licenses. D.C. Cir. JA 904. Under this deal, the FCC would have recovered $0.59/MHz/POP. While this reorganization plan certainly looked out for the government's financial interest, it was at war with FCC's regulatory interest in promoting competition and assisting the entry of small businesses into the marketplace. Ironically, the FCC had twice rejected applications by Nextel to participate in PCS auctions as a "designated entity." *Reconsideration of the Second Report and Order* ¶ 69. Nevertheless, the term sheet between Nextel and the FCC contemplated the waiver of regulations that prohibit a "designated entity" from transferring the license to an entity not meeting those asset and revenue restrictions. D.C. Cir. JA 905. The Congressional mandate to avoid "excessive concentration . . . by disseminating licenses among a wide variety of applicants," 47 U.S.C. § 309(j)(3)(B), was thus subordinated to the FCC's pecuniary interest.

After the FCC's attempted sale of NextWave to Nextel was scrapped, the FCC rebuffed several settlement overtures by NextWave and pinned its hopes on the Court of Appeals for the Second Circuit reversing the order of the bankruptcy court. Meanwhile, however, the publicly traded PCS stocks were experiencing a sharp rise in market valuations. In the three months from the bankruptcy court's

fraudulent transfer ruling (May 12, 1999) to issuance of the FCC-Nextel term sheet (August 10, 1999), PCS stock prices rose 19 percent. App. 1a. By the time the FCC submitted its brief to the Second Circuit (September 14, 1999), PCS stocks had risen another 34 percent. *Id.* On the date of oral argument (November 1, 1999), PCS stocks had risen another 33 percent, a 349 percent increase since NextWave's bankruptcy filing just 16 months earlier. *Id.*

By the time the Second Circuit rendered its opinion reversing the bankruptcy court, Pet. App. 213a., PCS stocks had risen still further. At then-current valuations, fully 500 percent higher than when the first C block auctioned, App. 1a, the FCC could expect to generate substantially increased revenues from the sale of the licenses. So, notwithstanding NextWave's January 10, 2000, offer to pay its entire license debt in a single lump sum payment, and notwithstanding 47 U.S.C. § 309(j)(7)(A) ("The Commission may not base a finding of public interest, convenience, and necessity on the expectation of federal revenues."), on January 12 the FCC abandoned numerous positions held throughout the 18-month bankruptcy proceeding and announced that NextWave's and other C Block licensees' licenses had automatically cancelled as of October 1998.[12] Rushing to bring its repossessed

[12] If, as the FCC now maintains, NextWave's licenses truly had automatically cancelled as of October 1998, one cannot help but wonder why the FCC did not reauction NextWave's licenses along with those that were forfeited as part of the FCC restructuring options in the spring of 1999. One reason may have been that the demand for spectrum at that time was so diminished by the FCC's flooding the market that the 1999 auction yielded merely $0.16/MHz/POP. FCC Public Notice, *C, D, E and F Block Broadband PCS License Auction Closes* (DA 99-757), 14 F.C.C.R. 6688, Attachment A (Apr. 20, 1999).

spectrum to market, the FCC announced the reauction of NextWave's that same day.[13]

To further ensure the maximization of revenue, the FCC took the additional step of opening the reauction of NextWave's and Urban Comm's licenses to the previously barred telecommunications giants. *Sixth Report and Order on Reconsideration* ¶¶ 17-19. While installment payments had been scrapped some time earlier, *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, 13 F.C.C.R. 15,743, ¶ 50 (Aug. 19, 1998) ("*Amendment Regarding Installment Payment Financing*"), the FCC had not yet reduced the sliver of spectrum occupied exclusively by "designated entities." Prior to the reauction of NextWave's and Urban Comm's licenses, however, the FCC capitulated to the demands of incumbent carriers for the opportunity to acquire more spectrum, especially in lucrative, densely populated urban areas. In a complicated restructuring of the C and F blocks, the FCC removed all "designated entity" restrictions on approximately half the licenses. *Sixth Report and Order on Reconsideration* ¶¶ 16-29. Furthermore, as to the few licenses still restricted to designated entities, the FCC relaxed ownership restrictions such that established telecommunications giants could hold substantial positions in (if not directly control) designated entities. 47 C.F.R. § 24.709(b) (2000).

[13] On September 6, 2000, the FCC announced that Urban Comm's licenses had also automatically cancelled and would be reauctioned along with NextWave's. FCC Public Notice (DA 00-2038), *C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000 Rescheduled for December 12, 2000*, 15 F.C.C.R. 17,251 (Sept. 6, 2000).

Despite the pendency of NextWave's appeal to the D.C. Circuit, the FCC pushed ahead with the reauction, ignoring concerns raised by NextWave and others that reauctioning the licenses prior to the completion of appellate review risked causing more litigation and more delays in bringing the spectrum to market. *In re Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses NextWave Personal Communications Inc. and NextWave Power Partners Inc. Petition for Reconsideration*, 15 F.C.C.R. 17,500, ¶ 11 (Sept. 6, 2000) ("*In re Public Notice DA 00-49*"). The FCC's haste is not surprising, given that PCS stock prices, after their meteoric rise, were beginning to descend to a more earthly realm. When the reauction commenced on December 12, PCS stock values had declined 39 percent from the January 12 announcement that NextWave's licenses had cancelled and were being reauctioned. App. 1a.

Nevertheless, PCS equity values were still 261 percent greater than they were when the first C block auction ended. *Id.* Demand was high, and the supply of PCS spectrum was limited. Led by Verizon, 35 bidders submitted high bids for NextWave's and Urban Comm's licenses that totaled $16.3 billion – $4.03/MHz/POP. FCC Public Notice (DA 01-211), *C and F Broadband PCS Auction Closes* (Jan. 24, 2001) ("C and F Block Reauction Results"). By moving quickly to reauction the spectrum, the FCC had fulfilled its purpose of locking in resale of the spectrum at a greatly increased value and realizing that increase in value for itself.

This course of conduct speaks volumes about the true nature of the FCC's interests. The precise correlation between the value of spectrum and the FCC's actions is no accident, but rather demonstrates that the FCC has

pursued its commercial and financial interests, to the exclusion of its genuine regulatory interests, at every stage of the bankruptcy proceedings.

III. The FCC's Alleged "Regulatory" Justification For Canceling C Block Licenses Is At War With The Defining Regulatory Feature Of The C Block Auction.

Whatever validity the FCC's avowed "regulatory" purpose may have as a general matter, it simply has no application with respect to the decision to cancel the licenses of the C block bidders. As noted previously, the C block licenses were intended to fulfill Congress's mandate that the wireless industry be opened to competition from new entrants and small businesses, and the defining regulatory feature of the C block auction was its restriction to bidders having assets and revenues below prescribed limits. The auction participants, including the FCC, fully understood that winning bidders would have to leverage their licenses in the capital markets in order to pay for and exploit the licensed spectrum. It was equally predictable that a sharp decline in the value of spectrum would close the capital markets to these licensees, imperiling all or virtually all of them. And when the value of spectrum did in fact plummet, the capital markets did in fact close to C block licensees. As the Bankruptcy Court noted: "Approximately $1.6 billion of public financing was sought by the C block licensees after the award of their licenses. Not one dollar of this $1.6 billion was raised in the public markets." Pet. App. 315. Consequently, virtually none of the 90 small businesses holding such licenses were able to make full and timely payment on their debt obligations.

Thus, the FCC's avowed "regulatory" justification for canceling the C block licenses – namely, that nonpayment demonstrates that another applicant (*i.e.*, a losing bidder) would have in fact been better able to put the spectrum into service – is plainly inapplicable in this case.[14] Given that virtually none of the winning C block bidders were able to make full and timely payment of their debt obligations, it is clear that such nonpayment is in no way inconsistent with their being "the 'best' of the potential licensees" that competed in the auction. FCC Br. 37. To the contrary, the very financial restrictions that qualified them to participate in the C block auction effectively guaranteed their inability to fulfill their license payment obligations in the face of a precipitous decline in spectrum value. And it is simply absurd to suggest that the next-highest bidders would have been able to withstand the market downturn to which the winning bidders uniformly succumbed.[15] A rising tide lifts all boats, and a falling tide begets the opposite phenomenon.

---

[14] When a regulatory agency, such as the FCC, finds it expedient to enter into arms-length commercial transactions with business entities, it must be held to the rules of contract and other commercial laws, including the bankruptcy laws, that govern all other commercial transactions. *See generally United States v. Winstar Corp.*, 518 U.S. 839 (1996). It cannot be allowed to change the rules when it suits it or its "regulatory" purpose. In the instant case, that principle has been legislated for the very situation in which NextWave and the *amici* find themselves. Perceptive legislators foresaw the evil with which the C block licensees are now faced – the likelihood that regulatory agencies would, under claim of "regulatory" power, attempt to annul the benefit of the "fresh start" principle by revoking the license of a bankrupt licensee – and therefore prohibited cancellation of licenses for non-payment of a debt that under the bankruptcy law is not payable.

[15] Reviewing the bankruptcy court's fraudulent transfer order, the district court reached the same conclusion. "[T]he C Block auction was a disaster for every participant. Those who bid but did not win are likely

(Continued on following page)

In short, the FCC's alleged regulatory purpose is in truth a regulatory ruse, designed to shield the agency, NextWave's largest creditor, from the requirements of the bankruptcy law.

* * *

As the foregoing reflects, the FCC's implementation of Congress's straightforward mandate to confer licenses on small businesses through a competitive bidding process has been a disaster for the C block licensees. These small companies made significant down payments and embarked upon the build-out of their networks. As a result of adverse market forces that were exacerbated by governmental policies and actions, these companies suffered a temporary setback in the execution of their business plans. For several years now, those that sought the shelter of bankruptcy protection have attempted to make full and timely payment on their license obligations. But rather than accept these payments and allow these entrants to fulfill Congress's original intent, the FCC has sought to repossess the spectrum and to reauction it at higher prices to companies controlled by the very entrenched incumbents that were excluded from bidding in the first place. Millions of customers have been inconvenienced by the scarcity of spectrum occasioned by the FCC's policy. This Court should not bless this strategy and condemn the spectrum to nonusage for years to come as the other bankruptcy and constitutional issues raised by NextWave and *amici* are resolved in the lower courts. Rather, the few remaining C block licensees should be permitted to become active participants in the wireless industry.

---

not hurt. . . . [I]f they had won the bid at the C block auction, they would likely be in bankruptcy right now." Pet. App. 270a.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

PREBEN JENSEN
CHARLES E. SIMPSON
DELTON VANDEVER
WINDELS MARX LANE
AND MITTENDORF, LLP
156 West 56th Street
New York, NY 10019
(212) 237-1000
Counsel for Amicus Curiae Urban Comm-North Carolina, Inc.

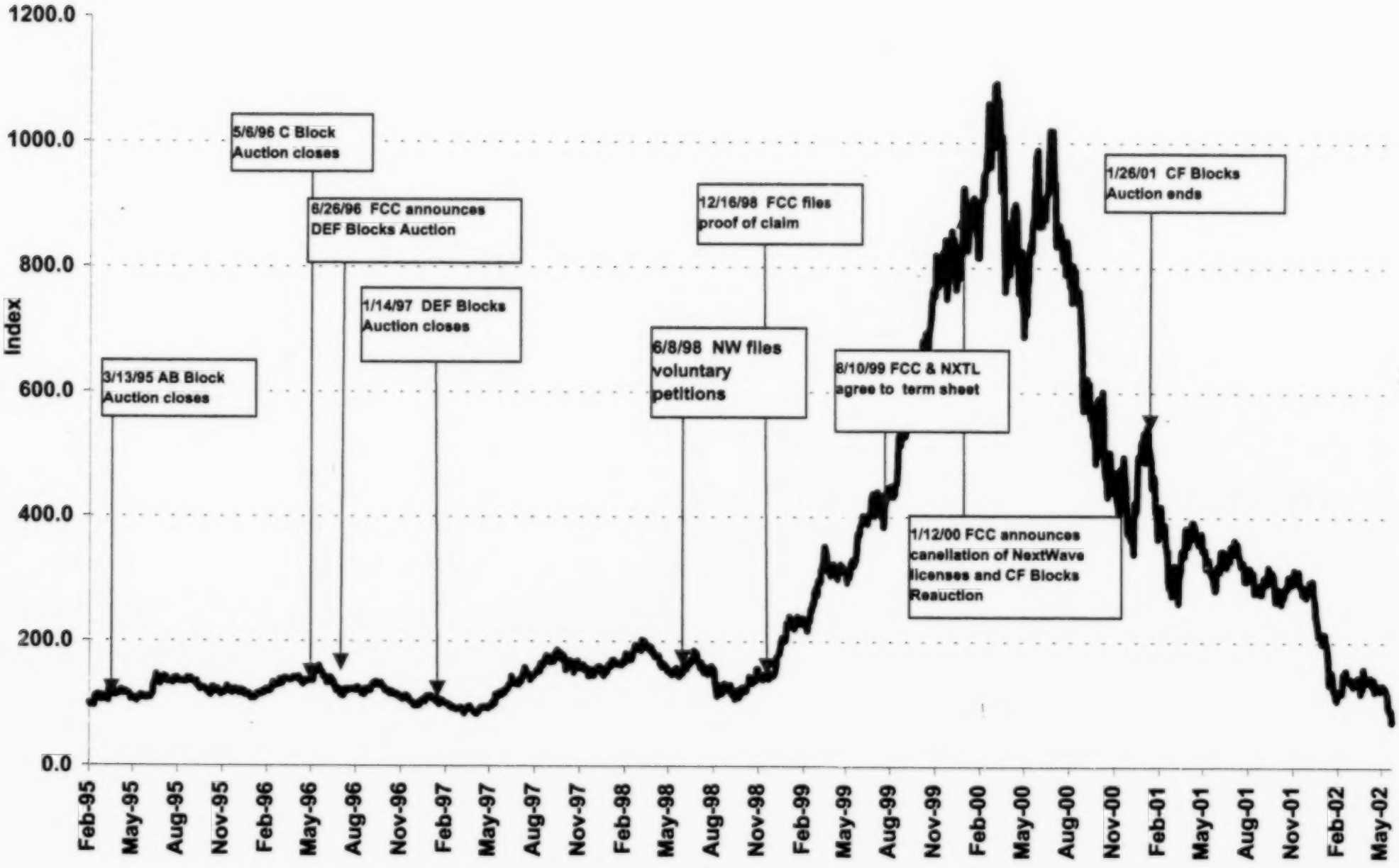
CHARLES J. COOPER
Counsel of Record
DAVID H. THOMPSON
MATTHEW D. MCGILL
COOPER & KIRK, PLLC
Suite 200
1500 K Street, N.W.
Washington, D.C. 20005
(202) 220-9600

BENJAMIN F. MANN
NANCY S. JOCHENS
BLACKWELL SANDERS PEPER
MARTIN LLP
Suite 1000
2300 Main Street
Kansas City, MO 64108
(816) 983-8000
Counsel for Amici Curiae Kansas Personal Communication Services, Ltd. and Bertha Coffin

June 21, 2002

Wireless Stock Price Index

March 1995 thru December 2001



Explanation Of Methodology To Create Historical Stock Price Index Graphs For The Wireless Sector

Based upon standard valuation practices in the investment banking industry, UBS Warburg, investment banker for several PCS businesses, including NextWave, has created a PCS Index that reflects the value of spectrum. The index reflects the valuation of publicly traded stocks for companies primarily engaged in the wireless PCS industry. Conglomerates whose valuations depend upon unrelated lines of business have been excluded from the index. The valuation of the "pure-play" wireless companies in the index is highly correlated with the value of spectrum because the markets value the companies in the index based upon their ability to generate earnings from the utilization of spectrum. The markets apply this same valuation analysis to spectrum itself: the value of spectrum depends upon the expected earnings that the wireless companies can generate from its use. Thus, there is a high correlation between the value of spectrum and the value of wireless companies.

To assess the historical trading patterns of equity securities in the wireless industry, we have employed a methodology using a market capitalization weighted average index ("Index"). In this indexing method, companies with larger equity market values contribute more heavily to the overall average index value. This is the same method by which the Nasdaq Combined Composite index is calculated.

BASIC INDEX METHODOLOGY

The following details the manner in which the market capitalization weighted index was constructed:

1) Identify the appropriate publicly traded companies to include in the index universe. For our index we included the following companies: Sprint PCS, Airgate PCS, Nextel, Western Wireless, U.S. Cellular, Omnipoint, Powertel and Aerial

2) Calculate the market capitalization of each company in the index on a specified start date ("Start Date," which we have chosen to be February 24, 1995). The market capitalization for a company on a given date is calculated by multiplying a company's shares outstanding by the company's ending share price on that date.

3) Sum the individual market capitalizations to get an aggregate market capitalization ("Aggregate Market Capitalization" or on the first measurement date the "Base Market Capitalization"). The Base Market Capitalization acts as the denominator in calculating the index on a given day.

4) Calculate the Aggregate Market Capitalization for the company set on each subsequent trading day from the Start Date until the last date of the evaluation period.

5) For each trading day, divide that day's Aggregate Market Capitalization by the Base Market Capitalization and multiply the result by 100. The result is that trading day's indexed value. By definition, the index must equal 100 on the Start Date, as the numerator and denominator of the index calculation both are equal to the Base Market Capitalization.

The following offers an example of the market capitalization weighted methodology:

	Market Cap ($)				
	Start Date	**Day 2**	**Day 3**	**Day 4**	**Day 5**
Company A	100	103	105	105	108
Company B	50	52	56	60	53
Company C	200	190	194	198	192
Total	350	345	355	363	353
Base Mkt Cap	350	350	350	350	350
Index	**100.0**	**98.6**	**101.4**	**103.7**	**100.9**

ADJUSTMENTS TO INDEX

Changing Company Set

Over an evaluation period, it is possible that certain companies either exit or enter the index set (companies may exit because of acquisition, bankruptcy or change of business mix; companies are usually added after an initial public offering). The calculation of the index adjusts to take into account the changes to the index set.

If a company is removed from the index, the Base Market Capitalization is adjusted by reducing its value by the market capitalization of the removed company as of the Start Date. This adjusted Base Market Capitalization is then used to calculate the index going forward. For example, if the market capitalization of the company to be removed on the Start Date was 15, then the index on the first trading day without the removed company would be calculated as follows:

Original Base Market Capitalization	100
Less: Market Cap on Start Date of Removed Company	15
New Base Market Capitalization	85
Aggregate Market Capitalization (ex Removed Company)	145
Index	170.6

If a company is added to the index and it is not the initial public offering for the newly added company, then a similar adjustment is made to the Base Market Capitalization (adding the market capitalization of the new company as of the Start Date) and the index is then calculated off the new Base Market Capitalization until another adjustment is required.

Special Adjustments For Initial Public Offerings

Because at the time of its initial public offering, a newly added company does not have a historical market capitalization as of the Start Date, the index calculation must adjust the Base Market Capitalization at the time of the initial public offering. To allow for the new company to be added to the index without creating a misleading impact to the index, the index is adjusted to reflect the day over day change in the Aggregate Market Capitalization of the company set since the new company was added. This is accomplished by taking the Aggregate Market Value from the current trading day divided by the Aggregate Market Value from the previous day and multiplying this quotient by the previous day's index. This methodology allows the index immediately prior to the IPO to be adjusted going forward by the relative day-to-day change in the company set's market capitalization, but include the new company's

impact on this change. Since the first time that there are two consecutive trading days that include the new company is the second trading day after the initial public offering, the impact of the new company is first reflected in the index on its second trading day.

Wireless Index Data

DATE	*Index Value*	*Description*
24-Feb-95	***100.0***	***Index Start Date***
27-Feb-95	***96.5***	***1995 Index Low***
1-Mar-95	98.1	First Trading Day of the Month
13-Mar-95	***114.0***	***A & B Block Auction Ends***
3-Apr-95	105.0	First Trading Day of the Month
1-May-95	121.6	First Trading Day of the Month
1-Jun-95	103.7	First Trading Day of the Month
3-Jul-95	114.9	First Trading Day of the Month
11-Jul-95	***146.3***	***1995 Index High***
1-Aug-95	141.3	First Trading Day of the Month
1-Sep-95	136.0	First Trading Day of the Month
2-Oct-95	135.8	First Trading Day of the Month
1-Nov-95	116.3	First Trading Day of the Month
1-Dec-95	120.7	First Trading Day of the Month
18-Dec-95	***118.9***	***C Block Auction Begins***
1-Jan-96	116.7	First Trading Day of the Month
1-Feb-96	113.5	First Trading Day of the Month
1-Mar-96	119.9	First Trading Day of the Month
1-Apr-96	141.0	First Trading Day of the Month
1-May-96	140.4	First Trading Day of the Month
6-May-96	***135.4***	***C Block Auction Ends***
3-Jun-96	150.8	First Trading Day of the Month
10-Jun-96	***160.3***	***1996 Index High***
26-Jun-96	***132.8***	***FCC Announces D, E, & F Block Auctions***
1-Jul-96	142.4	First Trading Day of the Month
1-Aug-96	120.5	First Trading Day of the Month
26-Aug-96	***124.1***	***D, E, & F Block Auction Begins***
2-Sep-96	121.9	First Trading Day of the Month
1-Oct-96	132.6	First Trading Day of the Month
1-Nov-96	116.0	First Trading Day of the Month
2-Dec-96	110.9	First Trading Day of the Month

23-Dec-96	***96.5***	***1996 Index Low***
1-Jan-97	97.6	First Trading Day of the Month
14-Jan-97	***110.2***	***D, E, & F Block Auction Ends***
3-Feb-97	106.6	First Trading Day of the Month
3-Mar-97	95.9	First Trading Day of the Month
31-Mar-97	***88.8***	***FCC Suspends Installment Payments on C Block Notes***
1-Apr-97	87.5	First Trading Day of the Month
2-Apr-97	***84.0***	***1997 Index Low***
21-Apr-97	***87.1***	***FCC Files UCC – 1 Financing Statements***
1-May-97	86.3	First Trading Day of the Month
2-Jun-97	100.9	First Trading Day of the Month
1-Jul-97	125.4	First Trading Day of the Month
1-Aug-97	145.5	First Trading Day of the Month
1-Sep-97	154.3	First Trading Day of the Month
1-Oct-97	173.5	First Trading Day of the Month
9-Oct-97	***186.2***	***1997 Index High***
3-Nov-97	168.1	First Trading Day of the Month
1-Dec-97	162.2	First Trading Day of the Month
1-Jan-98	159.5	First Trading Day of the Month
2-Feb-98	170.3	First Trading Day of the Month
2-Mar-98	174.6	First Trading Day of the Month
1-Apr-98	199.4	First Trading Day of the Month
3-Apr-98	***201.3***	***1998 Index High***
1-May-98	176.7	First Trading Day of the Month
1-Jun-98	146.5	First Trading Day of the Month
8-Jun-98	***152.0***	***NextWave Files Voluntary Petitions***
1-Jul-98	164.7	First Trading Day of the Month
3-Aug-98	158.1	First Trading Day of the Month
1-Sep-98	123.8	First Trading Day of the Month
1-Oct-98	114.5	First Trading Day of the Month
7-Oct-98	***107.5***	***1998 Index Low***
2-Nov-98	130.8	First Trading Day of the Month
1-Dec-98	141.9	First Trading Day of the Month

16-Dec-98	***143.7***	***FCC Files proof of Claim with the Bankruptcy Court***
23-Dec-98	***144.5***	***FCC Announces C, D, E, & F Block Reauction***
1-Jan-99	175.5	First Trading Day of the Month
4-Jan-99	***178.9***	***1999 Index Low***
1-Feb-99	234.1	First Trading Day of the Month
1-Mar-99	223.9	First Trading Day of the Month
23-Mar-99	***274.1***	***C, D, E, & F Block Reauction Begins***
1-Apr-99	315.5	First Trading Day of the Month
14-Apr-99	***313.6***	***C, D, E, & F Block Reauction Ends***
3-May-99	312.6	First Trading Day of the Month
12-May-99	***322.9***	***Bankruptcy Court Makes Fradulent Transfer Ruling***
1-Jun-99	302.9	First Trading Day of the Month
1-Jul-99	400.0	First Trading Day of the Month
2-Aug-99	429.3	First Trading Day of the Month
10-Aug-99	***384.2***	***FCC & Nextel Agree to Term Sheet to acquire NW Spectrum***
1-Sep-99	439.7	First Trading Day of the Month
14-Sep-99	***513.3***	***FCC Files 2d Circuit Brief***
1-Oct-99	574.5	First Trading Day of the Month
1-Nov-99	682.7	First Trading Day of the Month
		2d Circuit Oral Argument
1-Dec-99	770.9	First Trading Day of the Month
22-Dec-99	***813.0***	***2d Circuit Decision Reversing Bankruptcy Court***
27-Dec-99	***858.3***	***1999 Index High***
3-Jan-00	830.0	First Trading Day of the Month
10-Jan-00	***792.6***	***NextWave Offers to Pay FCC Full Amount Owed***
12-Jan-00	***790.4***	***FCC Announces Cancellation of the NW Licenses and the Reauction of the C & F Block***
1-Feb-00	879.1	First Trading Day of the Month
1-Mar-00	948.5	First Trading Day of the Month

27-Mar-00	***1094.8***	***2000 Index High***
3-Apr-00	1017.3	First Trading Day of the Month
1-May-00	894.3	First Trading Day of the Month
1-Jun-00	784.1	First Trading Day of the Month
3-Jul-00	892.7	First Trading Day of the Month
1-Aug-00	845.0	First Trading Day of the Month
1-Sep-00	796.4	First Trading Day of the Month
2-Oct-00	599.4	First Trading Day of the Month
1-Nov-00	579.2	First Trading Day of the Month
1-Dec-00	419.2	First Trading Day of the Month
12-Dec-00	***484.4***	***Reauction of the C & F Block Begins***
28-Dec-00	***363.3***	***2000 Index Low***
1-Jan-01	372.2	First Trading Day of the Month
23-Jan-01	***535.2***	***2001 Index High***
26-Jan-01	***488.6***	***Reauction of the C & F Block Ends***
1-Feb-01	544.9	First Trading Day of the Month
1-Mar-01	387.0	First Trading Day of the Month
2-Apr-01	297.2	First Trading Day of the Month
1-May-01	386.1	First Trading Day of the Month
1-Jun-01	318.0	First Trading Day of the Month
2-Jul-01	342.3	First Trading Day of the Month
1-Aug-01	357.6	First Trading Day of the Month
3-Sep-01	311.7	First Trading Day of the Month
1-Oct-01	300.0	First Trading Day of the Month
31-Oct-01	***261.4***	***2001 Index Low***
1-Nov-01	274.3	First Trading Day of the Month
3-Dec-01	300.3	First Trading Day of the Month
1-Jan-02	293.9	First Trading Day of the Month
2-Jan-02	***298.9***	***2002 Index High***
1-Feb-02	190.1	First Trading Day of the Month
1-Mar-02	118.3	First Trading Day of the Month
4-Mar-02	***118.7***	***FCC's Petition for Certiorari Granted***
1-Apr-02	138.3	First Trading Day of the Month
1-May-02	144.4	First Trading Day of the Month

3-Jun-02	119.7	First Trading Day of the Month
14-Jun-02	***73.1***	***2002 Index Low***

35
135D

JUN 21

Nos. 01-653 & 01-657

IN THE

Supreme Court of the United States

RECEIVED
JUN 27 2002
937967
LDC

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORPORATION,
COUNCIL TREE COMMUNICATIONS, LLC, AND
VOICESTREAM WIRELESS CORPORATION,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* CREDITORS OF NEXTWAVE PERSONAL COMMUNICATIONS, INC., SUPPORTING RESPONDENT

LAURENCE H. TRIBE
Counsel of Record
CHARLES FRIED
ELIZABETH WARREN
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4621

June 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Federal Communications Commission ("FCC") acted lawfully in retroactively canceling NextWave's communications licenses for failure to make timely installment payments while in Chapter 11 proceedings, and in denying NextWave any opportunity to cure, because the FCC was acting in a "fundamentally regulatory" capacity and was therefore exempt from the usual provisions of the Bankruptcy Code.

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT .. 2

ARGUMENT 6

I. THE FCC IS IMPROPERLY SEEKING SPECIAL TREATMENT AT THE EXPENSE OF OTHER CREDITORS. 6

A. The FCC Is Seeking Special Treatment That Congress Denied It. 7

B. NextWave's Commercial Creditors Reasonably Relied on the FCC's Repeated Acknowledgments That It Was Bound by Ordinary Bankruptcy Rules. 10

II. THE ASSERTION OF A "REGULATORY PURPOSE" DOES NOT DISPLACE THE BANKRUPTCY CODE. 16

A. The FCC's Purported Cancellation of the Licenses Violates Section 525(a). 16

1. The Government's Effort to Create a "Regulatory" Exception Should

Be Rejected. 19

2. Section 525(a) Cannot Be Evaded By Describing Payment As a "Condition" of the Licenses. 21

B. The FCC's Purported Cancellation of the Licenses Violates NextWave's Statutory Right to Confirm a Plan that Permits NextWave to Cure Any Default and Retain the Licenses. 23

III. THE FCC'S POSITION WOULD FRUSTRATE THE PURPOSES OF THE COMMUNICATIONS ACT. 25

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) 6
Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936) 15
Associates Commercial Corp. v. Rash, 520 U.S. 953 (1997) 29
Astoria Fed. Savings & Loan Ass'n v. Solimino, 501 U.S. 104 (1991) 9
Bank of Am. Nat'l Trust & Savings Ass'n v. 203 North LaSalle St. Partnership, 526 U.S. 434 (1999) 7
Benner, In re, 156 B.R. 631 (Bankr. D. Minn. 1993) 25
Board of Trustees v. Howren (In re Howren), 10 B.R. 303 (Bankr. D. Kan. 1980) 17
Brattleboro Hous. Auth. v. Stoltz, 197 F.3d 625 (2d Cir. 1999) 24
Cisneros v. Alpine Ridge Group, 508 U.S. 10 (1993) 25
Cohen v. De La Cruz, 523 U.S. 213 (1998) 21
Couture, In re, 225 B.R. 58 (D. Vt. 1998) 22
Cox, In re, 186 B.R. 744 (Bankr. N.D. Fla. 1995) 25
Curry, In re, 148 B.R. 966 (S.D. Fla. 1992) 22
Day, In re, 208 B.R. 358 (Bankr. E.D. Pa. 1997) 22
Dembek, In re, 64 B.R. 745 (Bankr. N.D. Ohio 1986) 17
Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 15
Ehrenberg v. Southern California Permanente Med. Group (In re Moses), 167 F.3d 470 (9th Cir. 1999) 25
Elsinore Shore Assocs., In re, 66 B.R. 723 (Bankr. D.N.J. 1986) 18, 22
Entz-White Lumber and Supply, Inc., In re, 850 F.2d 1338 (9th Cir. 1988) 24
Ex parte Yerger, 8 Wall. 85 (1869) 10
FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 9
Fintel, In re, 10 B.R. 50 (Bankr. D. Or. 1981) 17
Geffken, In re, 43 B.R. 697 (Bankr. N.D. Ohio 1984) 22

General Dev. Corp., In re, 163 B.R. 216 (S.D. Fla. 1994) . 22
Gibbs v. Housing Auth. of City of New Haven,
76 B.R. 257 (D. Conn. 1983) 17, 22
Gordon, Matter of, 217 B.R. 973 (Bankr. S.D. Ga. 1997) . 24
Hagen v. Utah, 510 U.S. 399 (1994) 10
Harris, In re, 85 B.R. 858 (Bankr. D. Colo. 1988). 18
Heath, In re, 3 B.R. 351 (Bankr. N.D. Ill. 1980) 17
Home Bldg. & Loan Ass'n v. Blaisdell,
290 U.S. 398 (1934) 10
Jacobs, In re, 149 B.R. 983 (Bankr. N.D. Okla. 1993) 18
Johnson v. Home State Bank, 501 U.S. 78 (1991) 10, 21
Kaiser Aetna v. United States, 444 U.S. 164 (1979) 15
Kan. Pers. Communications Servs., Ltd., In re:
252 B.R. 179 (Bankr. D. Kan.) 24
256 B.R. 807 (D. Kan. 2000) 20, 24
Kesler v. Department of Public Safety,
369 U.S. 153 (1962) 17
Kokoszka v. Belford, 417 U.S. 642 (1974) 10
La Rose v. FCC, 494 F.2d 1145 (D.C. Cir. 1974) 20
Lambillotte, In re, 25 B.R. 392 (Bankr.
M.D. Fla. 1982) 17
Lee v. *Board of Higher Educ.*, 1 B.R. 781 (S.D.N.Y. 1979) 17
*Long Island Railroad Co. v. Aberdeen & Rockfish Rail
Road Co.*, 439 U.S. 1 (1978) 25
*Melvin Beene Produce v. Agricultural Mktg.
Serv.*, 728 F.2d 347 (6th Cir. 1984) 19
NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984) 10
Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) 10
Ohio v. Kovacs, 469 U.S. 274 (1985) 5, 21
Patterson v. McLean Credit Union, 491 U.S. 164 (1989) .. 10
Patterson v. Shumate, 504 U.S. 753 (1992) 25
*Pennsylvania Dep't of Public Welfare v.
Davenport*, 495 U.S. 552 (1990) 5, 20, 21
Perez v. Campbell, 402 U.S. 637 (1971) 17
Pine Gate Assocs., In re:
2 B.C.D. 1478 (N.D. Ga. 1976) 30

3 B.C.D. 301 (N.D. Ga. 1977) 30
3 B.C.D. 813 (N.D. Ga. 1977) 30
3 B.C.D. 838 (N.D. Ga. 1977) 30
Posadas v. National City Bank, 296 U.S. 497 (1936) 10
Rake v. Wade, 508 U.S. 464 (1993) 23
Reitz v. Mealey, 314 U.S. 33 (1941) 17
Ridgely Communications, Inc., In re,
139 B.R. 374 (D. Md. 1992) 20
Rodriguez v. United States, 480 U.S. 522 (1987) 26
RTC v. Firstcorp., Inc. (In re Firstcorp., Inc.),
973 F.2d 243 (4th Cir. 1992) 24
Second Thursday, 33 F.C.C.2d 703, *recon. denied*,
34 F.C.C.2d 685 (1972) 20
Southeast Co., In re, 868 F.2d 335 (9th Cir. 1989) 23
St. Mary Hosp., In re, 89 B.R. 503
(Bankr. E.D. Pa. 1988) 17
Sudler, In re, 71 B.R. 780 (Bankr. E.D. Pa. 1987) 17
Szymecki, In re, 87 B.R. 14 (Bankr. W.D. Pa. 1988) ... 17, 22
Taddeo, In re, 685 F.2d 24 (2d Cir. 1982) 23
Tell, In re, 38 B.R. 327 (N.D. Ill. 1983) 18
Union Bank v. Wolas, 502 U.S. 151 (1991) 8
*United States v. James Daniel Good Real
Property*, 510 U.S. 43 (1994) 15
*United States v. United Continental Tuna
Corp.*, 425 U.S. 164 (1976) 10
United States v. Whiting Pools, Inc., 462 U.S. 198 (1983) .. 8
United States v. Winstar, 518 U.S. 839 (1996) 15
Walker, In re, 64 B.R. 751 (Bankr. S.D. Ohio 1986) 17
Walker, In re, 927 F.2d 1138 (10th Cir. 1991) 18
Welch, In re, 3 FCC Rcd. 6502 (1988) 20
Williams, In re, 158 B.R. 493 (Bankr. D. Id. 1993) 18, 22

Statutes, Regulation and Rule

Packers and Stockyard Act, 1921, 7 U.S.C. §§ 181-299 ... 19
Perishable Agricultural Commodities Act, 1930,
7 U.S.C. § 499a-s 19

7 U.S.C. § 204 19
11 U.S.C. § 101(27) 8
11 U.S.C. § 105(a) 29
11 U.S.C. § 106 8
11 U.S.C. § 106(a) 8
11 U.S.C. § 305(a) 29
11 U.S.C. § 362(a)(4) 19
11 U.S.C. § 362(a)(5) 19
11 U.S.C. § 362(b) 8
11 U.S.C. § 362(b)(4) 5, 19, 20
11 U.S.C. § 362(b)(8) 19
11 U.S.C. § 362(b)(12) 19
11 U.S.C. § 362(b)(13) 19
11 U.S.C. § 362(b)(16) 19
11 U.S.C. § 362(d) 29
11 U.S.C. § 364 2
11 U.S.C. § 365 5
11 U.S.C. § 365(d)(5)-(d)(9) 19
11 U.S.C. § 365(f)(1) 19
11 U.S.C. § 506 29
11 U.S.C. § 523(a) 5
11 U.S.C. § 525(a) ..... passim
11 U.S.C. § 541(a)(20) 20
11 U.S.C. § 542(a) 8
11 U.S.C. § 1101 2
11 U.S.C. § 1102(a)(1) 1
11 U.S.C. § 1109(b) 1
11 U.S.C. § 1111(b) 29, 30
11 U.S.C. § 1112(b) 29
11 U.S.C. § 1123 ..... 23, 25
11 U.S.C. § 1123(a)(2) 24
11 U.S.C. § 1123(a)(5)(G) 6, 23, 25, 29
11 U.S.C. § 1124 25
11 U.S.C. § 1124(2)(a) 6, 23, 24, 29
11 U.S.C. § 1129(a)(3) 29
11 U.S.C. § 1129(a)(7) 29

47 U.S.C. § 309(j) ..... passim
47 U.S.C. § 309(j)(3) 28
47 U.S.C. § 309(j)(3)(A) 3, 4
47 U.S.C. § 309(j)(3)(B) 26
47 U.S.C. § 309(j)(3)(D) 3
47 U.S.C. § 309(j)(4)(A) 10
47 U.S.C. § 309(j)(4)(B) 28
47 U.S.C. § 309(j)(4)(C) 4
47 U.S.C. § 309(j)(4)(E) 28
47 U.S.C. § 309(j)(5) 28
47 U.S.C. § 310(d) 3, 28
47 C.F.R. § 1.2110(g)(4)(iv) 11
Sup. Ct. R. 37.6 1

Other Authorities

Amendment of the Commission's Rules Regarding Installment, 13 FCC Rcd. 8345 (1998) 13
Amendment of the Commission's Rules Regarding Installment, 12 F.C.C.R. 16,436 (1998) 13
Brief of the County of Westchester in No. 99-5063 (2d Cir. filed Mar. 6, 2000) 15
145 Cong. Rec. S14104 (daily ed. Nov. 5, 1999) 9
COLLIER ON BANKRUPTCY (15th ed. 2001):
Vol. 2 29
Vol. 3 23
Vol. 7 30
FCC Public Notice in DA 98-547 (released Mar. 23, 1998) 14
H. REP. NO. 95-595 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6322 18
H.R. Rep. No. 801, 105th Cong., 2d Sess. (1998) 27
Letter of Prof. Douglas Baird, Vice Chair of National Bankruptcy Conference, to Rep. Henry Hyde, dated Feb. 8, 2000 11
Letter from Chief Counsel for Advocacy, U.S. Small Business Administration to Chairman Reed

Hundt, FCC, dated Sept. 8, 1997 11
RCR Magazine, Sept. 28, 1999 14
Rev'd UCC § 9-109(a)(1), comment 1 22
S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 23
Second Report and Order, 12 FCC Rcd. 16,436 (1997) ... 11

INTEREST OF *AMICI CURIAE*

Creditors of NextWave Personal Communications, Inc., including the Official Committee of Unsecured Creditors ("the Creditors Committee") and BFD Communications Partners, L.P. ("BFD"), respectfully submit this brief *amici curiae* in support of respondents.[1]

The Creditors Committee is the official representative of the thousands of businesses and investors who extended hundreds of millions of dollars in services, goods, and financing to NextWave to enable NextWave to acquire its licenses, build out its network, and fund its operations.[2] This large and diverse group includes corporate investors such as Sony, QUALCOMM, and Hughes Network Systems; hundreds of small businesses which provided supplies and services toward the build-out of the network; and large investment funds which manage money for banks, pension funds, and insurance companies.

The Creditors Committee has a vital interest in ensuring that the Federal Communications Commission ("FCC") is subject to the same rules the Bankruptcy Code applies to all other creditors. The members of the Creditors Committee stand to lose hundreds of millions of dollars if this Court sustains the FCC's contention that it is exempt from important provisions of the Code and is on

---

[1] Pursuant to Rule 37.6, *amici* certify that no counsel for any party authored this brief in whole or in part. No persons other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' consent to the filing of this brief have been submitted to the Clerk. In July 2000, Elizabeth Warren briefly served as a consultant to special counsel for respondent NextWave Personal Communications, Inc. with respect to a petition for rehearing. Since then, she has not represented any party in this case in any way.

[2] The Bankruptcy Code provides that, as soon as practicable after the commencement of a Chapter 11 case, "the United States Trustee shall appoint a committee of unsecured creditors holding unsecured claims" against the debtor. 11 U.S.C. § 1102(a)(1). The Creditors Committee's function is to represent the interest of general unsecured creditors in the debtor's Chapter 11 case, and § 1109(b) of the Code grants committees the right to appear and be heard on any issue in a Chapter 11 case.

that basis allowed retroactively to cancel NextWave's licenses. Under its reorganization plan, NextWave proposes to pay in full not only the FCC's claim, but also each of the claims of the Creditors Committee's constituents (whose claims exceed $500 million).

BFD is NextWave's post-petition lender and is not otherwise affiliated with NextWave. As the Bankruptcy Code contemplates, 11 U.S.C. §§ 364, 1101, BFD and other lenders made various loans after the commencement of the Chapter 11 case in order to allow NextWave to continue operating. In conjunction with this financing, the lenders took liens on the proceeds of NextWave's licenses to secure repayment of its loans. As the Code requires, NextWave and the lenders obtained the bankruptcy court's prior approval of these liens upon notice to the FCC. Significantly, the FCC never objected to the liens on the ground that the licenses had canceled (or could be canceled) for nonpayment during NextWave's bankruptcy case. On the contrary, the lenders relied on the FCC's repeated acknowledgments that NextWave's licenses would *not* cancel while NextWave attempted to reorganize. Accordingly, BFD requests that this Court affirm the judgment of the court of appeals.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici reasonably relied on the FCC's longstanding and publicly articulated position that, having chosen to create standard debt obligations as part of its installment payment scheme, it was bound by the same bankruptcy rules as all other creditors. At a time when the licenses were increasing in value, the FCC changed its tune and is now seeking special bankruptcy treatment, even though Congress has repeatedly rejected its pleas for such treatment. Not satisfied with its multiply protected status under the Bankruptcy Code as a fully secured creditor – a status it actively sought by taking installment notes, securing liens, and filing UCC financing statements – the FCC insists on special treatment as a kind of super-creditor, armed with the

power either to participate in the bankruptcy process or to exit it at will, as its financial interests might dictate.

The Government argues for this judicially created bankruptcy exemption on the ground that the FCC is acting in a "fundamentally regulatory" capacity. Govt. Br. 15. According to the Government, this controversy is not about the money but the principle of the thing: the Commission's ability to enforce the discipline of its auction mechanism and to punish "insincere bidding." Govt. Br. 29. Thus, concludes the Government, applying the Bankruptcy Code to prevent the Commission from revoking the bankrupt estate's spectrum licenses "would create clear incentives for speculation by permitting heads-I-win, tails-you-lose opportunities: If the value of the spectrum increased, winning bidders could eventually sell the license at a profit; and if the value decreased, licensees could seek to renegotiate license terms in bankruptcy court." *Id.* at 32.

The Government's argument is both wrong and irrelevant. It is wrong because NextWave did not make its bid on the gamble that it could sell its licenses at a profit if their value went up – a purpose in any event precluded by the anti-assignment provisions of Section 310(d) of the Communications Act – but with the firm intention of itself rapidly developing the technical and commercial structures for the full utilization of the licenses. This is exactly the intention expressed by Congress in Sections 309(j)(3)(A) and (D). It is captious to suggest that, because NextWave did not have the full amount of its bid in hand in disposable cash at the time of its bid, it was merely a gambler gaming the system. Of course, NextWave, or any other successful bidder, would seek equity and non-equity partners to finance not only the licenses but also the extensive (and expensive) physical and commercial infrastructures necessary to offer telecommunications service. If Congress had contemplated an exclusively cash-on-the-barrel-head system, in which only bidders with both technical expertise and vast resources could participate, it would not have suggested that the FCC consider the use of "guaranteed installment payments" to provide

"economic opportunities for a wide variety of applicants, including small businesses . . . ." 47 U.S.C. § 309(j)(4)(C). NextWave is exactly the kind of bidder, and *amici* are exactly the kinds of creditors, that Congress sought to encourage.

The Commission's story is wrong for another reason. NextWave was unable to meet its payment obligation not because it had gambled extravagantly (and *amici* did not lend and invest as an imprudent gamble), but because beginning in 1997 the telecommunications sector experienced a general market downturn in which some seventy-seven companies have filed for bankruptcy.

In any event, this dispute is no longer solely about NextWave. It is about the rights of its creditors who lent and invested money in a venture that may have entailed risk – but risk whose boundaries are set out in the bankruptcy laws. As lenders they were entitled to expect that they would be treated like other lenders of their class. As investors they were entitled to expect that their investments were subject to no greater hazard than the law imposes. They took a risk, but it is the very risk Congress in Section 309(j)(3)(A) wanted small businesses and their creditors to take.

The arrangements made in the seventy-seven telecommunications bankruptcies since 1997 show how the Code in fact promotes communications policy by preserving ongoing businesses while they use the breathing space afforded by the Code to rehabilitate themselves. Yet the FCC proposes retroactively to single out the NextWave creditors from other creditors in the industry that have made investments on the same assumption of the operation of the bankruptcy laws – perversely, at just the moment that NextWave was poised to implement a full payment plan.

Bidders such as NextWave require third-party financing in order to acquire licenses and build out their networks. Such financing will disappear if the FCC's arguments in this case are accepted, for no rational creditor would invest in a company like

NextWave if the FCC were authorized in the event of bankruptcy to revoke the essential licenses on which the company's business plan depends. The Congress that enacted Section 309(j) could not possibly have shared the view of the FCC's regulatory powers that the Government asserts in this case.

The Government's argument is also legally irrelevant in the sense that there exists no basis for this Court to craft a "regulatory exception" to the Bankruptcy Code, nor any basis for ignoring the clear words of Section 525(a) that "a governmental unit may not . . . revoke . . . a license, permit, charter, franchise, or other similar grant . . . solely because [the] debtor . . . has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. § 525(a). Section 525(a) necessarily applies when the Government is acting in a regulatory capacity through the issuance of licenses and similar grants. The FCC's plea for special treatment echoes similar claims by other governmental agencies that this Court has repeatedly rebuffed. *See Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552 (1990); *Ohio v. Kovacs*, 469 U.S. 274 (1985). That line of precedent controls here and establishes an approach to interpreting the Bankruptcy Code and Communications Act in which Congress has acquiesced. When Congress decides to grant special bankruptcy status to a particular government agency or program, it does so explicitly: it has created special regulatory exceptions to the automatic stay provision, Section 362(b)(4); to the executory contracts provision, Section 365; to the discharge provision, Section 523(a); and to Section 525(a) itself.

In stark contrast, Congress has not created any FCC exception to the Bankruptcy Code. Indeed, Congress has squarely rejected legislative proposals to confer special bankruptcy status on the FCC. If NextWave may be deprived of its licenses because it did not promptly pay required installments, then so may every debtor that falters in its monetary obligations to some unit of government – high or low, federal, state or local. If NextWave and its creditors may be

punished for venturing to seek the public's business on credit – if that qualifies as "gaming" the system – then Section 525(a) might as well be read out of the Code. Because governmental agencies frequently appear as creditors in bankruptcy cases, accepting the FCC's argument in this case will set a disastrous precedent that will disrupt bankruptcy cases nationwide.

The judgment below must in any event be affirmed, on the ground that the FCC's cancellation of the licenses violated NextWave's right to "cure" any default under Sections 1123(a)(5)(G) and 1124(2)(a). Under its Chapter 11 plan, NextWave proposes to pay the FCC in full, with interest and late fees. Indeed, had the FCC not announced its surprise cancellation, NextWave already would have emerged from bankruptcy, paid the FCC and all other creditors in full, and put the spectrum covered by its licenses to immediate use. If the FCC is permitted to proceed with the cancellation and resale of NextWave's licenses, the FCC will be the only party to receive satisfaction of its claim – three times over, for the Commission claims that the licenses are now worth $15 billion. Govt. Br. 12. The FCC's position thus violates the critical bankruptcy principle of equality among creditors.

ARGUMENT

I. THE FCC IS IMPROPERLY SEEKING SPECIAL TREATMENT AT THE EXPENSE OF OTHER CREDITORS.

From the perspective of the Bankruptcy Code, this case is remarkable only in its ordinariness. NextWave seeks to do what several hundred thousand debtors do every year when they declare bankruptcy: pay what the law requires them to pay to their secured and their unsecured creditors, reorganize their affairs, and emerge from bankruptcy. The FCC has no experience or expertise in bankruptcy matters, and its views regarding the Code are of course not entitled to deference. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990). Having voluntarily assumed secured creditor status, the FCC

should be governed by the same rules as every other secured creditor.

A. The FCC Is Seeking Special Treatment That Congress Denied It.

The bankruptcy system was developed to address a "common pool" problem: if each individual creditor relies on unilateral debt-collection remedies to seize as much of the debtor's estate as he can for himself, the creditors *as a group* may be worse off overall. Bankruptcy responds to this economically destructive behavior by enforcing a system of cooperation among creditors. The Bankruptcy Code's efficacy depends on the ability of a bankruptcy court to marshal a debtor's assets and prevent creditors, including governmental agencies, from engaging in individual debt collection activities that diminish the debtor's value or prevent the orderly administration of the debtor's affairs. *See Bank of Am. Nat'l Trust & Savings Ass'n v. 203 North LaSalle St. Partnership*, 526 U.S. 434, 453 (1999) (purposes of Chapter 11 are "preserving going concerns and maximizing property available to satisfy creditors").

Government agencies appear frequently as creditors in bankruptcy cases, whether to collect license fees, judgments, or tax liens. If they are accorded super-creditor status, or are otherwise immunized from the usual bankruptcy rules that govern every other creditor, then the administration of bankruptcy cases will be severely disrupted and the basic purpose of Congress will be frustrated. Not only will post-petition lending come to an immediate halt for any company dependent on a government license, but the effects would ripple through the marketplace in the start-up and expansion investment phases for any company.

The ability of any creditor to ignore the Bankruptcy Code's provisions and act on its own initiative jeopardizes the congressional scheme for the rehabilitation of bankrupt debtors. In this case, for example, NextWave has long been prepared to consummate its Chapter 11 plan, which would permit NextWave

to pay its creditors in full (including the FCC), with interest and late fees, retain its assets, provide employment for its workers, produce a return for its investors, and permit the continued construction and operation of its network. Now that it believes it can re-sell the licenses for more money, the FCC wants none of this. It asserts its own short-term institutional interest to the detriment of NextWave's other creditors, employees, and customers, in violation of the "prime bankruptcy policy of equality of distribution among creditors of the debtor." *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991).

The Bankruptcy Code does not grant federal agencies immunity from the requirements of the statute. To the contrary, Section 106 of the Code expressly provides for the application of the Code to agencies like the FCC. *See* 11 U.S.C. § 106(a) ("governmental units"); *id.* § 101(27) (defining "government unit" to include federal agencies). Thus, in *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), this Court declined to create a special Internal Revenue Service exception to the Code (there, the "turnover" provision of Section 542(a)). This Court opined that "[w]e see no reason why a different result should obtain when the IRS is the creditor. The Service is bound by § 542(a) to the same extent as any other secured creditor." *Id.* at 229. "Nothing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector . . . ." *Id.*

This lesson is especially salient here, because Congress has repeatedly rejected requests for an FCC exemption from the Bankruptcy Code in light of the potential adverse impact on creditors. In fact, Congress declined to enact even more modest relief – an FCC exception to the automatic stay provision of Section 362(b) – than the Commission seeks here.[3] Having been

[3] In a letter dated May 12, 2000, Members of the House Judiciary Committee explained that "[e]very member of the [Commercial and Administrative Law] Subcommittee present at the hearing expressed his concern or disagreement with the FCC's position that it is exempt from the automatic stay provision – a position contrary to congressional intent when it enacted section 362(b) in 1997. . . . [The FCC's proposals] conflict with one of the Bankruptcy Code's fundamental tenets that all similarly situated creditors be treated equally absent significant public policy reasons warranting some form of preferred treatment (e.g., police and regulatory enforcement officials, spousal and child support claimants, victims of fraud). These proposals, however, would endow the FCC with more protections than virtually any other creditor, including the Internal Revenue Service, has under the current bankruptcy law. . . . If enacted, this proposed legislation could potentially destroy a debtor's prospect for economic rehabilitation and deprive creditors of a major source of repayment." *See* 145 Cong. Rec. S14104 (daily ed. Nov. 5, 1999) (Johnson Amendment No. 2523 to Bankruptcy Reform Act of 1999, S. 625).

turned down by Congress, the FCC now asks this Court for an even more ambitious exemption from Section 525(a). *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000) (considering congressional rejection of bills granting the FDA jurisdiction over tobacco).

Congress enacted Section 309(j) of the Communications Act against the background understanding that federal agencies are governed by the Bankruptcy Code. There is no conflict between the two statutes involved in this case, but if there were it would be resolved by a fundamental principle governing the orderly development of federal statutory law: Whenever Congress enacts a statute and entrusts a federal agency to apply its terms or to fill in gaps to implement that statute's policies, there is at the very least a strong presumption (on which creditors can rely) that the agency is not exempt from preexisting background federal statutes, except where the laws expressly so provide. "[L]egislative repeals by implication will not be recognized, insofar as two statutes are capable of coexistence, 'absent a clearly expressed congressional intention to the contrary.'"[4]

[4] *Astoria Fed. Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991) (citation omitted); *see also Hagen v. Utah*, 510 U.S. 399, 416 (1994); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *Ex parte Yerger*, 8 Wall. 85,

This Court has recognized the particular importance of this rule in harmonizing federal statutes with the Bankruptcy Code.[5]

B. NextWave's Commercial Creditors Reasonably Relied on the FCC's Repeated Acknowledgments That It Was Bound by Ordinary Bankruptcy Rules.

The FCC was nowhere compelled by Section 309(j) to enter into a creditor-debtor relationship with bidders. Although Section 309(j) of the Communications Act suggested the possibility of using installment payments of some kind, it also suggested alternative methods of encouraging small business participation in auctions. 47 U.S.C. § 309(j)(4)(A). Yet the FCC deliberately designed its system of installment payments to create a debtor-creditor relationship. The FCC recognized the attendant risk. "By allowing payment in installments," the Commission stated, "the government is in effect extending credit to licensees . . . ." Pet. App. 4a. In 1998 the FCC decided to suspend installment payments as a financing method. Pet. App. 50a.[6]

---

105 (1869). *Cf. Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 257-62 (1827) (contracts, as forms of private law, are deemed to be undertaken subject to the prior law, particularly bankruptcy law); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934) (prior law includes, for this purpose, the underlying "postulate[s] of the legal order" even when not reduced to positive enactments). On the collaborative relation between Congress and the Court in the matter of construing federal statutes, see *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

[5] *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 521-23 (1984) (Bankruptcy Code rather than NLRA governed the assumption or rejection of collective bargaining agreement); *Kokoszka v. Belford*, 417 U.S. 642, 650-52 (1974) (Bankruptcy Act rather than Consumer Protection Act governed garnishment of certain property); *see also Johnson v. Home State Bank*, 501 U.S. 78, 86 (1991) (court must "[p]resum[e] . . . that Congress was familiar with the prevailing understanding of 'claim'").

[6] *See* Pet. App. 91a ("the culprit was installment payments") (statement of Commissioner Furchtgott-Roth); *Second Report and Order*, 12 FCC Rcd. 16,436, 16,502 (1997) ("the Commission, *as a creditor*, ought to behave in a

Until January 12, 2000, the FCC itself repeatedly acknowledged that it wore the hat of a prepetition creditor, bound by the ordinary bankruptcy rules that apply to all other creditors. As a result, the FCC induced DIP lenders to advance millions of dollars to NextWave and other creditors to continue doing business with the company. *Amici* would have been paid in full (along with the FCC) in January 2000, if the Commission had not repudiated its prior position. *Amici* have now sat stranded for thirty months after their reliance on the FCC's representations.

From the beginning, the FCC had NextWave sign promissory notes for the licenses; took security interests (liens) in each of the licenses; and perfected its interests by filing UCC financing statements. Pet. App. 2a, 5a, 401a-416a. The FCC's own regulations treated NextWave's payment obligation as a debt. *See* 47 C.F.R. § 1.2110(g)(4)(iv) (license holder in default for nonpayment "will be subject to debt collection procedures, if the payment due on the payment resumption date . . . is more than ninety (90) days delinquent"). These pre-bankruptcy actions by the FCC were undertaken long before litigation commenced in this case and did not reflect any attempt to "hedge" against unfavorable court rulings. When NextWave filed for bankruptcy, the FCC continued its pattern of behaving as an ordinary creditor by submitting proofs of claim in NextWave's bankruptcy case asserting debts in excess of $4 billion,

---

commercially reasonable manner") (statement of Chairman Hundt) (emphasis added); Letter from Chief Counsel for Advocacy, U.S. Small Business Administration to Chairman Reed Hundt, FCC, dated Sept. 8, 1997, at 4 ("[T]he FCC operates not only as a regulator and banker/debt-collector, but also serves in the capacity of government-as-contractor."); Letter of Prof. Douglas Baird, Vice Chair of National Bankruptcy Conference, to Rep. Henry Hyde, dated Feb. 8, 2000 (the FCC "wears the hat of a prepetition creditor. It entered into a transaction with NextWave in which it agreed to issue a license in return for a promissory note. As an entity that is owed a fixed sum, the FCC should participate in the bankruptcy process on the same basis as any other creditor.").

representing the amount of installment payments owed to the FCC. Pet. App. 37a.

The bankruptcy court identified "countless written and oral utterances and acts of the FCC" during the bankruptcy proceeding in which the FCC repeatedly acknowledged that NextWave's licenses were subject to the protections of the Bankruptcy Code. Pet. App. 135a; *see also id.* at 21a-22a. For example, the FCC represented in court that "NextWave will still enjoy bankruptcy protection from collection of C block license payments pending reorganization of its business affairs," Pet. App. 181a; that "[d]uring the pendency of the bankruptcy, the Bankruptcy Court and the automatic stay would hold creditors at bay, including the Federal Communications Commission," *id.* at 182a; and that cancellation of the licenses "hasn't [happened] in this case due to the automatic stay." *Id.* The bankruptcy court found that "*at no time* prior to the January 12 [2000] Declaration did the FCC ever assert the position, or even intimate," that NextWave's licenses had automatically canceled. *Id.* at 148a (emphasis in original). "To the contrary, the FCC made repeated declarations in judicial proceedings utterly inconsistent with the notion that NextWave's Licenses automatically canceled in January 1999, and all three Federal courts which have issued rulings in these proceedings have done so upon the assumption that the licenses were not cancelled." *Id.* In addition, "the parties . . . spen[t] millions of dollars in litigation costs, DIP lenders . . . continue[d] lending millions of dollars secured by the licenses, [and NextWave] continue[d] to expend money in preparation to build out its PCS systems," "all on the assumption that the licenses ha[d] not cancelled." *Id.* at 154a. The bankruptcy judge described the FCC's about-face as "shocking." *Id.* at 135a.

The FCC never sent NextWave an invoice for installment payments, even though it provided licensees who had not filed for bankruptcy with new payment schedules in the summer of 1998 and payment reminders in July and October 1998. CAJA

925.[7] In these restructuring orders, the FCC described licensee payment obligations as "debts."[8] The FCC took no action to cancel NextWave's licenses when it did not make its first interest payment in October 1998. Had the FCC believed that the licenses canceled automatically in October 1998, as it now contends, there would have been no need to wait fifteen months to seek cancellation – especially in light of the Commission's professed desire to put the spectrum to use without delay.

Moreover, although the October 1998 payment date applied equally to NextWave's C- and F-block licenses, and despite the fact that NextWave made no payments on the F-block licenses while in bankruptcy, the FCC *never* sought to lift the automatic stay to allow for cancellation of the F-block licenses. The FCC told the bankruptcy court that "[t]here is no trigger for the automatic cancellation . . . to date with regard to [NextWave's] the F-block licenses," and that NextWave "can comply with . . . payment obligations" and keep its F-block licenses. Pet. App. 172a n.12.

Indeed, ten months *after* the purported cancellation date, the FCC continued to reaffirm that the licenses had not canceled. On August 10, 1999, the FCC signed a "term sheet" with Nextel (a competitor of NextWave) providing "for the transfer of substantially all of the assets of the NextWave Debtors, including the Licenses, to Nextel." CAJA 538-39. The FCC's agreement with Nextel was premised on the assumption, shared by all parties, that the licenses had *not* canceled but continued to be held by NextWave. In a letter dated September 27, 1999 to Rep. Bliley, the FCC Chairman stated that "the government would support an alternative reorganization plan proposed by

---

[7] Citations to the Joint Appendix in the court of appeals are styled "CAJA __."

[8] *See Amendment of the Commission's Rules Regarding Installment*, 13 FCC Rcd. 8345, ¶ 31 (1998); *Amendment of the Commission's Rules Regarding Installment*, 12 F.C.C.R. 16,436, ¶ 40 (1998).

Nextel Communications Inc. ('Nextel') for the PCS licenses now held by NextWave Personal Communications, Inc. ('NextWave')." The FCC proposed to "grant a waiver of the C and F block eligibility rules to allow a transfer of NextWave's licenses to Nextel pursuant to a court-approved reorganization plan."

In the Nextel term sheet, the FCC acted as a secured creditor in preparing an alternative plan of reorganization that provided for the discharge of its claim and the disposition of the licenses in accordance with the provisions of the Bankruptcy Code. The document refers to and treats the FCC as a "creditor." It provides for the classification and treatment of all claims, including the FCC's claim as a secured creditor. Part IV, entitled "Secured Claims of the Federal Communications Commission," begins with the description: "This claim is held by the FCC on account of promissory notes, the FCC's rules and regulations and the Licenses. The obligations under such notes are secured by first liens on the respective licenses and the proceeds thereof." See RCR Magazine, Sept. 28, 1999 ("The federal government was acting as a creditor – not a regulator – when two officials . . . signed a letter indicating Nextel could buy the spectrum awarded to NextWave") (statement of Ari Fitzgerald, legal advisor to FCC Chairman William Kennard).

The FCC similarly acted as a secured creditor in the bankruptcy of Pocket Communications, Inc., the second highest C-block bidder, which filed for bankruptcy in March 1997, fifteen months before NextWave. The FCC intervened in the Pocket bankruptcy as a creditor. In March 1998, the FCC announced an agreement with Pocket creditors discounting Pocket's bid obligations by approximately sixty percent and extending the pay-back period to twelve years. *See* FCC Public Notice in DA 98-547 (released Mar. 23, 1998).

This pattern of behavior by the FCC created important

"investment-backed expectations" on the part of *amici*.[9] These expectations are entitled to protection even when (indeed, especially when) the government regulator acts in a proprietary capacity as a creditor or business partner. *See United States v. Winstar*, 518 U.S. 839 (1996) (holding Government liable for breaching regulatory contract with savings and loans).

In fact, government action should be scrutinized "more closely" when "the Government has a direct pecuniary interest in the outcome of the proceeding." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 (1994) (citation omitted). The FCC's actions in this case bear the unmistakable signs of gamesmanship. Only after the licenses had increased in value did the FCC renounce its willingness to participate in the bankruptcy proceeding and claim super-creditor status in order to revoke the licenses and sell them to a higher bidder. Accordingly, the County of Westchester appeared as an *amicus* in the Second Circuit to accuse the FCC of seeking an "economic windfall for itself." *See* Brief of the County of Westchester in No. 99-5063, at 8-9 (2d Cir. filed Mar. 6, 2000). Whether or not the FCC had that intent here, a ruling in its favor would clearly have that effect, and its legal theory certainly invites such opportunistic behavior by all government agencies, any of which could decide to press claims in bankruptcy whenever a license's value had fallen, or instead to revoke licenses in bankruptcy whenever the license's value had risen. The impact of such manipulation on commercial creditors – in this case at the very moment they were to be paid in full – would be devastating.

---

[9] *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 518, 523, 527, 532 (1998) (plurality opinion); *id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 556-58 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). At minimum, the Code should be construed to avoid the serious constitutional question that would be presented by an interpretation that defeats these expectations. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

II. THE ASSERTION OF A "REGULATORY PURPOSE" DOES NOT DISPLACE THE BANKRUPTCY CODE.

A. The FCC's Purported Cancellation of the Licenses Violates Section 525(a).

Amici were entitled to rely on the plain language of Section 525(a) of the Bankruptcy Code. By its terms, the statute proscribes the FCC's purported cancellation of NextWave's licenses. That provision commands that "a governmental unit may not . . . revoke . . . a license, permit, charter, franchise, or other similar grant . . . [or] condition such a grant . . . solely because [the] debtor . . . has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. § 525(a). Section 525(a) is an important bankruptcy provision that protects not merely debtor interests, but creditor interests as well. No rational creditor would lend to or invest in any business requiring a license if local, state, and federal agencies could claim super-creditor status in the event of bankruptcy. Because licenses, permits, and the like are frequently important elements of an estate, Section 525(a) protects this value for the benefit of creditors. The statute ensures equality among creditors by preventing the Government from playing a "regulatory" trump card.

The Government's plea that "it's not about the money" could be made in any case where a government agency appears as a creditor. That plea cannot render the Bankruptcy Code inapplicable. Indeed, Section 525(a) addresses *precisely* the context where government agencies are acting in a *regulatory* capacity: in the administration of licenses, permits, charters, franchises, and similar grants. Because of the need to encourage investment, protect market expectations, and ensure orderly reorganizations, Congress decided to create *no* catch-all regulatory exception. As the Government acknowledges, Govt. Br. 30, Section 525 was intended to build on *Perez v. Campbell*, 402 U.S. 637 (1971), which held that a regulatory purpose or motive is irrelevant. *Id.* at 651-52. The Government's argument

would resuscitate the very cases that *Perez* explicitly overruled. *Id.* at 652 (discussing *Kesler v. Department of Public Safety*, 369 U.S. 153 (1962), and *Reitz v. Mealey*, 314 U.S. 33 (1941)). Nor does the application of Section 525(a) depend in any way on whether the license is deemed to be "property of the estate." *Cf.* Govt. Br. 46 n.15.

Section 525(a) has a well-developed meaning in the regulatory context, on which the creditors were entitled to rely. Case after case has established that government agencies are prohibited from revoking licenses or similar grants in a wide range of settings based on the past or present nonpayment of dischargeable debts to government agencies as well as to third parties. For example, public housing agencies may not deny continued occupancy in public housing based upon the nonpayment of dischargeable debts for past rent;[10] public educational institutions may not deny student transcripts based upon the nonpayment of dischargeable tuition or student loan debts;[11] and agencies may not revoke or deny – based on the nonpayment of dischargeable debts – rights to participate as providers in the Medicare program,[12] contractor's licenses,[13] real

---

[10] *Gibbs v. Hous. Auth. of City of New Haven*, 76 B.R. 257 (D. Conn. 1983); *In re Szymecki*, 87 B.R. 14, 16 (Bankr. W.D. Pa. 1988); *In re Sudler*, 71 B.R. 780, 786-87 (Bankr. E.D. Pa. 1987).

[11] *Lee v. Board of Higher Educ.*, 1 B.R. 781, 787 (S.D.N.Y. 1979); *In re Dembek*, 64 B.R. 745, 750-51 (Bankr. N.D. Ohio 1986); *Board of Trustees v. Howren (In re Howren)*, 10 B.R. 303, 305-06 (Bankr. D. Kan. 1980); *In re Heath*, 3 B.R. 351, 353-54 (Bankr. N.D. Ill. 1980).

[12] *In re St. Mary Hosp.*, 89 B.R. 503, 510-12 (Bankr. E.D. Pa. 1988).

[13] *In re Walker*, 64 B.R. 751 (Bankr. S.D. Ohio 1986); *In re Lambillotte*, 25 B.R. 392, 393-94 (Bankr. M.D. Fla. 1982); *In re Fintel*, 10 B.R. 50, 52 (Bankr. D. Or. 1981).

estate licenses,[14] liquor licenses,[15] licenses to practice law,[16] insurance agent licenses,[17] or casino licenses.[18]

If the FCC were treated as a super-creditor, government agencies in every bankruptcy case would claim a similar privilege, destroying the estate's valúe, as in this case, or otherwise claiming a right to special treatment not recognized by the Bankruptcy Code. In virtually every case, a government agency could claim an ostensibly "regulatory" motive for its concern with timely payment, and move in and out of bankruptcies as it saw fit, leaving the statute all but meaningless.

The Government contends that its cancellation of NextWave's licenses did not violate Section 525(a) because it did not "discriminate" against the debtor. Govt. Br. 40-41. But, as its text states, Section 525(a) prohibits and in that sense *defines* as a forbidden form of "discrimination" against debtors the revocation of a license based solely on the nonpayment of a dischargeable debt. Section 525(a) extends to "discrimination *or other action* based solely . . . on the . . . nonpayment of a debt discharged in the bankruptcy case." H. REP. NO. 95-595, at 366-67 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6322 (emphasis added). The Government's argument that there must in addition be some kind of animus against the bankrupt is inapposite to the point of absurdity.

---

[14] *In re Walker*, 927 F.2d 1138, 1141 (10th Cir. 1991); *In re Harris*, 85 B.R. 858 (Bankr. D. Colo. 1988).

[15] *In re Tell*, 38 B.R. 327, 330 (N.D. Ill. 1983).

[16] *In re Williams*, 158 B.R. 493, 495-96 (Bankr. D. Id. 1993).

[17] *In re Jacobs*, 149 B.R. 983 (Bankr. N.D. Okla.1993).

[18] *In re Elsinore Shore Assocs.*, 66 B.R. 723, 739 (Bankr. D.N.J. 1986).

1. The Government's Effort to Create a "Regulatory" Exception Should Be Rejected.

Section 525(a) carves out three exceptions to the general rule.[19] Notably, the Communications Act is not one of those exceptions. And all three exceptions would have been unnecessary if Congress had shared the FCC's view that "regulatory" debts are outside the scope of the Bankruptcy Code. When Congress intends to create special bankruptcy exceptions for particular government agencies or programs, it does so explicitly. *See, e.g.*, 11 U.S.C. § 362(b)(8) (Department of Housing and Urban Development); § 362(b)(12), (13) (Departments of Transportation and Commerce); § 362(b)(16) (Department of Education); § 365(d)(5)-(d)(9), (f)(1) (landing rights at airports).

There is no "regulatory" exception to Section 525(a), a fact on which both pre-petition and post-petition creditors relied when they lent money to NextWave. No such exception may be manufactured by transplanting the regulatory power exception from the automatic stay, which is a wholly different provision, narrowly tailored to fit very different circumstances. 11 U.S.C. § 362(b)(4).[20] The FCC has already asked Congress to expand

---

[19] The exceptions are the Perishable Agricultural Commodities Act, 1930, 7 U.S.C. § 499a-s; *see Melvin Beene Produce v. Agricultural Mktg. Serv.*, 728 F.2d 347 (6th Cir. 1984); the Packers and Stockyard Act, 1921, 7 U.S.C. §§ 181-299; and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943. 7 U.S.C. § 204.

[20] The "regulatory power" exception of Section 362(b)(4) is in any event inapplicable here, because the FCC's cancellation of NextWave's licenses served to protect its pecuniary rather than its regulatory interest. In addition, Section 362(b)(4) does not extend to the stay of acts to "create, perfect, or enforce" liens against property of the estate under Sections 362(a)(4) and (a)(5). The FCC took the position below that canceling the licenses and seeking to collect on the debt was "tantamount . . . to foreclosing on the

Section 362(b)(4), and the legislature rejected the request. *See* n.3, *supra*. Section 362(b)(4) confirms that the absence of a "regulatory" exception to Section 525(a) is deliberate: when Congress wished to create a "regulatory" power exception in the Bankruptcy Code, it knew full well how to do so.

This Court has repeatedly protected creditors by rejecting attempts by governmental agencies to exempt themselves from the Code. In *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552 (1990), for example, this Court held that restitution obligations imposed as conditions of probation in state criminal actions constitute dischargeable "debts." This Court rejected the argument – also made by the FCC here – that the Government's purpose determines whether its claim is a "debt" within the meaning of the Bankruptcy Code: the Code "makes no reference to purpose. The plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve

---

collateral" (Pet. App. 41a) and that such pursuit of monetary indebtedness did not fall within Section 362(b)(4). *See* Pet. App. 21a-22a, 174a-176a.

Although a license may not confer an ownership interest in the spectrum itself, *see* Govt. Br. 46 n.15, it plainly confers a right to *use* the designated frequencies for the specified purpose. This right is sufficient to trigger the concept of "property of the estate" under Section 541(a) for the specialized purposes of the Code. The FCC itself has treated the right as an "asset" of NextWave's estate. *See* Part I-B, *supra*; *see also In re Kan. Pers. Communications Servs., Ltd.*, 256 B.R. 807, 810 (D. Kan. 2000) ("The FCC apparently acknowledges that a licensee holds a limited property interest in a license"); *In re Ridgely Communications, Inc.*, 139 B.R. 374, 377 (D. Md. 1992) (FCC has "acknowledged that a license confers certain private rights upon the licensee and that these rights may be sold for profit to a private party, subject to Commission approval"); *In re Welch*, 3 FCC Rcd. 6502, 6503, 6505 n.27 (1988) (acknowledging that licensee holds limited property interest in license). The FCC treats licenses as assets of the debtor-in-possession, transferred by operation of law under *Second Thursday*, 33 F.C.C.2d 703, *recon. denied*, 34 F.C.C.2d 685 (1972), and it routinely approves such transfers as pro forma transactions to protect "innocent creditors." *La Rose v. FCC*, 494 F.2d 1145, 1148 (D.C. Cir. 1974).

in imposing the obligation." *Id.* at 559.[21] *See also Cohen v. De La Cruz*, 523 U.S. 213, 218 (1998) (statutory treble damages for violation of New Jersey Consumer Fraud Act qualified as "debt": "a 'right to payment' . . . 'is nothing more nor less than an enforceable obligation,'" and "[t]hose definitions reflec[t] Congress' broad . . . view of the class of obligations that qualify as a 'claim' giving rise to a 'debt'") (citations omitted); *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985) (debtor's obligation to clean up hazardous waste site under state environmental statute was "debt" subject to discharge under the Code because "Congress desired a broad definition of a 'claim' and knew how to limit the application of a provision to contracts when it desired to do so.").

The Government's argument would have consequences it could hardly welcome outside the circumstances of this single case. If NextWave's obligation to the FCC were not a "debt," then the Government would have talked itself out of any share at all of the assets in Chapter 7 and Chapter 11 cases. *See Kovacs*, 469 U.S. at 286 (O'Connor, J., concurring). To be sure, canceling the licenses so that they revert to the FCC for re-auction may suit the Commission on the facts of this case, where the market rose after the bankruptcy petition was filed, but the opposite will be true in instances of declining license values – precisely when bankruptcies are most likely.

2. Section 525(a) Cannot Be Evaded By Describing Payment As a "Condition" of the Licenses.

According to the FCC, the licenses were conditioned on the requirement that the licensee make timely installment payments, so that nonpayment resulted in automatic cancellation – despite the filing of bankruptcy, Section 525(a), and the FCC's earlier

---

[21] Although Congress subsequently overruled the result in *Davenport*, it did so by creating an exception to dischargeability and did not disturb this Court's "conclusions on the breadth of the definition of 'claim' under the Code." *Johnson v. Home State Bank*, 501 U.S. 78, 83 n.4 (1991).

representations. But any license could be said to be "conditioned" on a payment obligation. If that were enough to render Section 525(a) inapplicable, the statute would be a dead letter. The Government's argument is reminiscent of other attempts to squirm out of the bankruptcy laws, such as the old conditional sales device. *Every* installment sale could be recast as a "condition" – if the buyer pays, the seller will give up control of the item. This conception is so routine that the Uniform Commercial Code explicitly notes that a secured creditor's efforts to recast its secured loan as a condition will be completely unavailing. Rev'd UCC § 9-109(a)(1), comment 1.

The creditors were entitled to rely on the expectation that the FCC could not circumvent the Code through such legerdemain. Section 525(a) prohibits not merely revoking a license based on the nonpayment of a dischargeable debt but also conditioning a license on a bankrupt's payment of an otherwise dischargeable debt.[22]

---

[22] *In re General Dev. Corp.*, 163 B.R. 216 (S.D. Fla. 1994) (city could not condition approval of platting land upon payment of dischargeable taxes); *In re Williams*, 158 B.R. 493 (Bankr. D. Id. 1993) (reinstatement application could not be conditioned upon payment of dischargeable costs of disciplinary proceeding); *In re Couture*, 225 B.R. 58 (D. Vt. 1998) (public housing tenant may not be required to pay discharged unpaid rent as condition of lease agreement); *In re Curry*, 148 B.R. 966 (S.D. Fla. 1992) (same); *Gibbs v. Housing Auth. of City of New Haven*, 76 B.R. 257 (D. Conn. 1983) (same); *In re Day*, 208 B.R. 358 (Bankr. E.D. Pa. 1997) (same); *In re Szymecki*, 87 B.R. 14 (Bankr. W.D. Pa. 1988) (same); *In re Geffken*, 43 B.R. 697 (Bankr. N.D. Ohio 1984) (conduct of business may not be conditioned on payment of prepetition premiums due to state workers' compensation fund); *In re Elsinore Shore Assocs.*, 66 B.R. 723, 739 (Bankr. D.N.J. 1986) (gaming commission could not require payment of prepetition fees "as a condition of relicensure").

B. The FCC's Purported Cancellation of the Licenses Violates NextWave's Statutory Right to Confirm a Plan that Permits NextWave to Cure Any Default and Retain the Licenses.

The court of appeals' judgment would in any event have to be affirmed on the alternative ground that the FCC's purported revocation of the licenses violated NextWave's rights under Section 1123, which grants a Chapter 11 debtor the right to cure "any" default, "[n]otwithstanding any otherwise applicable nonbankruptcy law." 11 U.S.C. § 1123(a)(5)(G). Section 1124(2)(a) similarly contemplates a plan which "(A) cures any such default that occurred before or after the commencement of the case under this title," and this applies "(2) notwithstanding any contractual provision or applicable law that entitles" a creditor to demand accelerated payment.

Thus, even if there had been a default in the timely payment of installments, the Code would provide the right to cure the default and reinstate the obligation. Curing a default "tak[es] care of the triggering event and return[s] to predefault conditions. The consequences are thus nullified." *In re Taddeo*, 685 F.2d 24, 26-27 (2d Cir. 1982). A debtor who cures a default and assumes the debt on the original terms "abrogates" creditors' rights arising from default. *Rake v. Wade*, 508 U.S. 464, 472 n.9 (1993). "[T]he Code provides a broad right to cure, regardless of whether the agreement itself would permit cure." 3 COLLIER ON BANKRUPTCY ¶ 365.05[3][b]. For example, "Section 1124(2) permits the plan to reverse a contractual or legal acceleration." *Id.* 1124.03. A cure is adequate so long as it offers the creditor "the substantial equivalent to its economic rights." *Id.* ¶ 365.05[3][b]. The right to cure is an "important reorganization technique" that furthers the Code's goal of giving debtors a "fresh start" and at the same time granting relief to creditors. S. Rep. No. 989, 95th Cong., 2d Sess. 120 (1978); *see also In re Southeast Co.*, 868 F.2d 335, 336 (9th Cir. 1989) (holding that plan properly denied creditor post-default-rate interest specified

in note, because cure "restores the relation of contracting parties to pre-default status .... [T]he Code 'authorizes a plan to nullify all consequences of default, including avoidance of default penalties such as higher interest.'") (quoting *In re Entz-White Lumber and Supply, Inc.*, 850 F.2d 1338, 1342 (9th Cir. 1988)).

No more dramatic example of the rehabilitative objectives of the "cure" provisions of the Code could be imagined than this case. NextWave's plan provides for full payment to the FCC, including installment payments, interest, late charges, and penalties. The Commission's interests are thus completely protected. Conversely, if the statutory right to cure were not honored and the FCC were permitted to cancel NextWave's licenses retroactively, the result would be economic catastrophe for its commercial creditors.

It would be impermissible to create a "regulatory" exception to the right to cure, based on the assertion that installment payments to federal agencies were "untimely." Debtors are explicitly authorized to cure both pre-petition and post-petition breaches, thus permitting a debtor to correct its earlier difficulties through its plan of reorganization. 11 U.S.C. §§ 1123(a)(2), 1124(2)(A) (unimpairment "cures any such default that occurred before or after the commencement of the case"). Debtors may cure defaults in obligations to governmental as well as commercial creditors. *See, e.g.*, *Brattleboro Hous. Auth. v. Stoltz*, 197 F.3d 625, 629-31 (2d Cir. 1999) (affirming debtor's right to cure default under lease with government agency); *In re Kan. Pers. Communications Servs., Ltd.*, 252 B.R. 179, 195 (Bankr. D. Kan.) (Chapter 11 debtor could cure default in payment obligations to FCC), *rev'd on other grounds*, 256 B.R. 807 (D. Kan. 2000).[23]

---

[23] *See also RTC v. Firstcorp., Inc. (In re Firstcorp., Inc.)*, 973 F.2d 243, 247 (4th Cir. 1992) (savings and loan holding company required to cure default to regulator in capital maintenance obligation before it could reorganize under Chapter 11); *Matter of Gordon*, 217 B.R. 973, 975 (Bankr. S.D. Ga.1997) (holding that defaults regarding tax claims could be cured and rejecting argument that debts to the Government are outside the right to cure: "Because the plain meaning of this statute encompasses not only mortgage loans but also obligations such as the one before me, I reject the United States' first contention. Where Congress' intent is unmistakably evident from plain language, no further inquiry need be made into the scope of the statute."); *In re Cox*, 186 B.R. 744, 746 (Bankr. N.D. Fla. 1995) (although the "federal government's need for the repayment of student loans [is] an important policy objective," default regarding student loans could be cured); *In re Benner*, 156 B.R. 631 (Bankr. D. Minn. 1993) (student loan defaults cured).

Nothing in Sections 1123 and 1124 limits the right to cure to "non-regulatory" actions by governmental creditors. Rather, the plain language of Section 1123(a)(5)(G) extends to "any" default, "[n]otwithstanding any otherwise applicable nonbankruptcy law" – words that this Court has recognized should be given the broadest possible meaning. In *Patterson v. Shumate*, 504 U.S. 753, 758-59 (1992), for example, this Court held that the phrase "applicable nonbankruptcy law" encompasses "any relevant nonbankruptcy law." *See also id. at* 766 (Scalia, J., concurring) (suggesting that narrower readings of this language depart so far from the text as to negate the ideal of "a government of laws, not of men"); *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) ("notwithstanding" signals intent "to supersede all other laws," and a "clearer statement is difficult to imagine"); *Long Island Railroad Co. v. Aberdeen & Rockfish Rail Road Co.*, 439 U.S. 1, 5 (1978) (per curiam) ("notwithstanding any other provision of law" includes federal law); *Ehrenberg v. Southern California Permanente Med. Group (In re Moses)*, 167 F.3d 470, 475 (9th Cir. 1999) ("'applicable nonbankruptcy law' clearly include[s] federal and state law").

III. THE FCC'S POSITION WOULD FRUSTRATE THE PURPOSES OF THE COMMUNICATIONS ACT.

Ironically, the FCC's position would defeat rather than promote the congressional policies embodied in Section 309(j). For private financing will be chilled, if not eliminated altogether,

if the FCC is allowed to cancel licenses retroactively. Creditors such as *amici* will not supply needed funds to enable licensees to bid for spectrum – let alone to build out their communications networks – if the FCC can claim super-creditor status and cancel critical licenses in the event of bankruptcy. The Commission's ability to grab valuable licenses whenever it decides to do so will thus retard the asserted interest in the prompt and effective utilization of the spectrum.

In fact, Congress would never have suggested installment payments as an option if it had shared the FCC's view of the law. Section 309(j)(3)(B) instructs the FCC to promote the allocation of licenses among "a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by minority groups and women." These new entrants could not succeed without extensive third-party financing. The consideration of installment payments as an option reflects the congressional recognition that bidders – having already raised the maximum available in private capital markets – might need even *more* credit from the FCC in the form of installment payments spread out over time. The FCC, however, would choke off such financing by placing its immediate institutional interests above those of NextWave's other creditors.

The Government contends that the FCC must be granted super-creditor status in order to prevent what it describes as "opportunities for speculation" in license auctions. Govt. Br. 24. Even if it were valid, the Government's policy argument would provide no basis for departing from the clear language of the Bankruptcy Code. *See Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). But there is no significant danger of speculation, any risk of which has been fully addressed by Congress.

First, the economic reality is that bidders without well-founded business plans and appreciable prospects for success in the marketplace will not attract needed third-party investment. *Amici* in this case provided funds to NextWave not as part of some speculative venture but because NextWave had a viable

business plan. *Amici* included a wide range of large corporate strategic investors, small businesses, investment funds, insurance companies, and retirement funds, with their own financial and fiduciary responsibilities to shareholders and investors. It is absurd to suggest that NextWave, or any other bidder, could organize such a diverse group of creditors and convince them to invest in a $500 million "jump into bankruptcy" strategy.

NextWave was formed by a group of experienced telecommunications executives, including the former president of the wireless business at QUALCOMM, Inc. CAJA 1183. Its board includes Dr. Allen Puckett (chairman and former CEO of Hughes Aircraft and Electronics) and Judge William Webster. NextWave did not "speculate" at the C-block auctions in May and June 1996. Its bids were within the range of valuation of comparable publicly traded wireless companies such as Omnipoint Corporation. CAJA 1184. By early 1997, NextWave had a staff of nearly 400 employees and 300 contractors in 22 offices; over $2 billion in financing commitments for deployment of network equipment from major vendors; and ninety percent of the microwave links needed for the initial launch of service across the country. CAJA 1184-85. The company had installed and operated network trial systems in Washington, D.C., San Diego, Las Vegas, and San Antonio. In short, NextWave was not a speculator. It was well underway to putting its spectrum to immediate use. Its financial difficulties are attributable to external factors, including a general market downturn in the telecommunications sector which began in 1997 and which has caused some seventy-seven companies to file for bankruptcy.[24]

---

[24] Information available at *www.bankruptcydata.com*. Some have identified a direct role by the FCC in NextWave's collapse. *See* H.R. Rep. No. 801, 105th Cong., 2d Sess. 14 (1998) ("the FCC's handling of license-related issues greatly contributed to the C-block debacle"). Whether or not the FCC was responsible for NextWave's financial difficulty, the salient point is that at the very least it was caused by exogenous factors and was not the product of

The risk of speculation in license auctions is even more fanciful in light of the heavy restrictions on license transfers, 47 U.S.C. § 310(d), and the substantial downpayment required under the auction rules. Winning C-block bidders were required to pay five percent of the bid within five days of the close of the auction, and an additional five percent at the time of the license grant. Pet. App. 53a-54a n.4. NextWave was required to make a $504 million deposit when it first received the licenses, and the FCC has taken the position that this deposit is non-refundable.

The FCC has ample means of ensuring that winning bidders put the spectrum to prompt use. It could condition license grants on specified build-out targets, periodic checks of financial health, or other evidence that winning bidders are capable of using their licenses in the public interest. Even if the FCC decided to retain installment payments, it could require winning bidders to obtain third-party guarantees for license fee obligations.

The Government is wrong in claiming that such alternative measures would run counter to Congress' purposes. Govt. Br. 49-50. In fact, Section 309(j) expressly states that the FCC is authorized to "specify[] eligibility and other characteristics of [the] licenses and permits," to "design[] the methodologies for use" of auctions, and to "include safeguards to protect the public interest." 47 U.S.C. § 309(j)(3). The Commission is directed to include "performance requirements, such as appropriate deadlines . . . to prevent stockpiling or warehousing of spectrum by licensees," and to impose "antitrafficking restrictions." *Id.* § 309(j)(4)(B), (E). The FCC is also instructed to develop standards for bidder and licensee qualifications. *Id.* § 309(j)(5). The statute plainly contemplates a system in which the FCC experiments with various eligibility tests and standards in order to ensure that Congress' goals are met. *See id.* § 309(j)(3) ("The Commission shall seek to design and test multiple alternative

---

"speculation" on NextWave's part.

methodologies"). The FCC demonstrably errs in asserting that Congress has authorized nothing beyond a bare-bones auction scheme, stripped of any eligibility criteria or qualifying tests.

In addition, the Bankruptcy Code protects the Government, as it protects all other creditors, from "heads-I-win, tails-you-lose" speculation. For example, a bankruptcy petition that is not filed in good faith may be dismissed by the court.[25] A debtor which proceeds with its reorganization plan will not be allowed to retain its licenses for free. If the debtor proposes to cure and reinstate its payment obligation to the FCC pursuant to Sections 1123(a)(5)(G) and 1124(2)(a), it will be required to pay its debt to the FCC in full – just as in any case where a default is cured. If the debtor proposes instead to impair the FCC's debt by altering the terms and conditions of the obligation, the FCC, unlike priority and general unsecured creditors, is entitled to the full value of its allowed secured claim. 11 U.S.C. § 506.

If the FCC is oversecured – if the value of its claim is less than the value of the collateral securing it (as the FCC asserts is true in the instant case) – then the FCC is entitled under Section 1129(a)(7) to insist on payment in full, plus interest, fees and costs. Although a debtor may stretch out the term of the debt, it cannot reduce its pecuniary value.

If the FCC is undersecured (as in the case of declining license values), it may choose to have its claim bifurcated into secured and unsecured portions.[26] Or, pursuant to Section 1111(b), it may elect to forgo the bifurcation option and instead insist on

---

[25] *See* 11 U.S.C. § 105(a); *id.* § 305(a); *id.* § 362(d); *id.* § 1112(b); 2 COLLIER ON BANKRUPTCY ¶ 301.17 (15th ed. 2001); *see also* 11 U.S.C. § 1129(a)(3) (Chapter 11 plan not confirmable if not "proposed in good faith").

[26] *See Associates Commercial Corp. v. Rash*, 520 U.S. 953, 961 (1997). The debtor is then obligated to pay the present value of the allowed secured claim and to pay the unsecured portion *pro rata* with other unsecured creditors, but with various added protections.

payment in full in nominal dollars – payments whose present value must equal the present value of the collateral and whose total value (although not its present value) must equal the amount of the overall claim. *See* 7 COLLIER ON BANKRUPTCY ¶ 1111.03 (15th ed. 2001) ("[S]ection 1111(b) protects the legitimate expectation of the secured lender that the bankruptcy laws will be used only as a shield to protect debtors and not as a sword to enrich debtors at the expense of secured creditors.").

In short, the FCC's concerns about speculation are resolved by the Bankruptcy Code. Nor is the danger of "speculation" that the Government describes unique to FCC licenses. That danger affects *all* secured creditors, not just government agencies. In fact, the difficulty, which is known as the "*Pine Gate*" problem, first arose not in the communications context but in the field of real estate, a notoriously cyclical market.[27] Accordingly, the Code already contains a provision (Section 1111(b)) addressing the risk of speculation in volatile markets. The FCC's concern (if there were one) should excite no special sympathy, because it is simply the concern of every secured creditor when the bankrupt debtor cannot satisfy all of its creditors completely. The Code balances the competing rights of creditors, giving exceptional – but not unlimited – protection to the secured creditor. It is not for this Court to upset that balance by elevating the FCC to super-creditor status, or to second-guess Congress' solution to the *Pine Gate* problem. As a result of the FCC's strategy, the creditors – instead of being paid in full (along with the Commission) in January 2000 – have endured more than thirty months of delay in litigation attempting to enforce the plain meaning of Section 525(a).

CONCLUSION

The judgment of the court of appeals should be affirmed.

---

[27] *See, e.g., In re Pine Gate Assocs., Ltd.*, 2 B.C.D. 1478 (N.D. Ga. 1976); 3 B.C.D. 301 (N.D. Ga. 1977); 3 B.C.D. 813; 3 B.C.D. 838.

Respectfully submitted.

DAVID FRIEDMAN
KASOWITZ, BENSON, TORRES
& FRIEDMAN
1633 Broadway
New York, N.Y. 10019
(212) 506-1740

LAURENCE H. TRIBE
Counsel of Record
CHARLES FRIED
ELIZABETH WARREN
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4621

June 2002

FOR ARGUMENT

Supreme Court, U.S.
FILED
JUN 21 2002
CLERK

(17) (14)

Nos. 01-653 and 01-657

In the
SUPREME COURT OF THE UNITED STATES
October Term 2002

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL., *Respondents*

ARCTIC SLOPE REGIONAL CORPORATION, ET AL., *Petitioners*

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF KATHRYN R. HEIDT *AMICUS CURIAE*

This Brief is Filed with the Consent of the Parties
Party Supported: Respondent

PROFESSOR KATHRYN R. HEIDT
Counsel of Record
723 Hastings Street
Pittsburgh, PA 15206
(412) 441-0648

30 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. APPLYING SECTION 525(a) OF THE BANKRUPTCY CODE TO ALLOW THE FCC TO CANCEL NEXTWAVE'S LICENSES IS INCONSISTENT WITH FUNDAMENTAL POLICIES OF BANKRUPTCY LAW 5

A. The Policy of Debtor Rehabilitation 6

B. The Policy of Equal Treatment for Similar Creditors 8

C. Permitting the FCC to Cancel and Resell NextWave's Licenses Creates Inefficiencies in the Bankruptcy System 12

D. Permitting the FCC to Cancel and Re-sell NextWave's Licenses Fails to Maximize the Bankruptcy Estate 13

II. ALLOWING THE FCC AND OTHER GOVERNMENTAL AGENCIES TO CLAIM A REGULATORY EXCEPTION TO SECTION 525(A) WILL ENCOURAGE STRATEGIC BEHAVIOR NOT GROUNDED ON ANY PRINCIPLED OR COHERENT READING OF THE BANKRUPTCY CODE 15

III. THE FCC IS ATTEMPTING TO OPT OUT OF THE BANKRUPTCY PROCESS 18

CONCLUSION..... ...21

TABLE OF AUTHORITIES

Cases

Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. Partnership, 526 U.S. 434 (1999) 13

Begier v. I.R.S., 496 U.S. 53 (1990) 9

Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985) 14

Local Loan Co. v. Hunt, 282 U.S. 234 (1934) 6

National Labor Relations Board v. Bildisco & Bildisco, 465 U.S. 513 (1984) 7

NextWave, Personal Service Comm. Inc. v. FCC, 254 F.3d 130 (D.C. Cir. 2001) 17

NextWave IV, 235 B.R. 263, 305 (Bankr. S.D.N.Y. 1998) 17, 20

Ohio v. Kovacs, 469 U.S. 274 (1985) 18, 21

Perez v. Campbell, 402 U.S. 637 (1971) 13

Toibb v. Radloff, 501 U.S. 157 (1991) 14

United States v. Whiting Pools, Inc., 462 U.S. 198 (1983) 7

Books/Articles

G. Eric Brunstad, *Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law*, 55 Bus. Law. 499 (2000).....6

Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. Chi. L. Rev. 815 (1989) 7

Karen Gross, FAILURE AND FORGIVENESS 205-31 (1997) 8

Kathryn R. Heidt, ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY (1993) 20

Thomas H. Jackson, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 8-13 (1985) 12

Elizabeth Warren, *Bankruptcy Policy*, 54 U. Chi. L. Rev. 775 (1987) 8

Statutes

11 U.S.C. § 101(5) 19, 20

11 U.S.C. § 101(12) 16, 20

11 U.S.C. § 362 8

11 U.S.C. § 506(a) 16, 17

11 U.S.C. § 507(a)(8), (9) 10

11 U.S.C. §525(a) 3, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

11 U.S.C. § 541(a)(1) 12

11 U.S.C. § 542(a) 12

11 U.S.C. § 726 .... 9, 16

11 U.S.C. § 727(a)(1) 7

11 U.S.C. § 1141(d) 7

11 U.S.C. § 1123 21

11 U.S.C. § 1126 20

11 U.S.C. § 1129(a) 21

11 U.S.C. § 1129(b) 17, 21

Uniform Commercial Code § 9-608 17

H.R. Rep. No. 95-598, at 220 (1977) *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179 .... 8, 13

S. Rep. No. 589, 95th Cong., 2 Sess. 9, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5795 7

INTEREST OF *AMICUS CURIAE*

Kathryn R. Heidt is a law professor at the University of Pittsburgh School of Law in Pittsburgh, Pennsylvania and is the incoming Chair of the American Bar Association's Business Bankruptcy Committee.* She has also taught as a visiting professor at the University of Pennsylvania School of Law and at New York Law School. She teaches courses in bankruptcy law, contracts, commercial law, corporate reorganizations, and negotiations of commercial and business transactions. She has written extensively on bankruptcy law. She is the author of the treatise ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY (1993) along with its annual supplements through 2001. She has written over a dozen law review articles on the subject of bankruptcy and commercial law. She speaks regularly to judges, practicing lawyers and law professors on these subjects.

Professor Heidt intends to bring to these proceedings perspectives that are broader than those which may be brought to the attention of the Court by the parties. These perspectives take into account additional interests to those advocated by the parties. Specifically, Professor Heidt considers the effect that a ruling in this case will have on a number of different interests in a Chapter 11 case involving a governmental regulatory action. Such interests include those of creditors (both secured and unsecured, consensual and non-consensual) reorganizing debtors, shareholders, employees, taxpayers and the communities in which the debtor operates. She considers the practical, conceptual and theoretical problems involved whenever a governmental unit (in this case the United States Federal Communications Commission, "FCC") attempts to exempt itself from the bankruptcy process. She is concerned that exempting the FCC from the bankruptcy process will profoundly and adversely affect the ability of future debtors having a governmental unit as a creditor to reorganize. This, in turn, will reduce substantially the recovery for creditors and shareholders, and have a negative impact on employees, local communities and other interested parties.

---

*No part of this brief represents the views of the University of Pittsburgh School of Law, the University of Pittsburgh, or of the American Bar Association. No counsel for any party to the action authored this brief in whole or in part. No person, other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Court of Appeals for the District Court Circuit correctly held that the Federal Communications Commission ("FCC") could not cancel and resell licenses, which it previously sold to NextWave. First, allowing the FCC to revoke the licenses will have profound effects in all bankruptcies in which a governmental unit has issued a license, grant, permit or similar right. These effects conflict with the fundamental bankruptcy goals of debtor rehabilitation, fairness, efficiency, and maximization of recovery for creditors and others. These effects include: (1) undermining the goal of the fresh start and debtor rehabilitation by making it impossible for a company to rehabilitate itself to the detriment of creditors, shareholders, employees, the local community and others; (2) violating the principle of fairness or equality – that similarly situated creditors be treated equally – by permitting the governmental unit creditor to elevate its status over other similarly situated creditors by allowing it to unilaterally grant to itself a priority over other creditors; (3) violating the goal of efficiency by increasing the amount of litigation that will follow due to the uncertainty that will follow if the Court rules in favor of the FCC; and (4) subverting the policy of maximizing recovery for creditors and other interested parties by minimizing the value of the bankruptcy estate.

Second, should this Court hold that the FCC is not subject to Section 525(a) when it engages in any activity it deems "regulatory," the FCC and other governmental units will be compelled to engage in strategic behavior by maintaining inconsistent positions in various cases. This strategic behavior goes beyond the argument that governmental units will add a notion of regulatory purpose to the appropriate statutes or regulations so as to avoid the grasp of Section 525(a). Governments units will make strategic decisions and choices in which bankruptcy cases they should raise the notion of the

regulatory exemption and in which they should not. These case-by-case decisions will not be made on any principled, coherent, or consistent reading or application of the Bankruptcy Code; but rather on such factors as whether the debtor is in Chapter 7 or 11, whether the debtor is an individual or an entity, and the value of the license at the time of bankruptcy and later.

Third, the FCC is attempting to effectively exempt itself from the bankruptcy process – an attempt that should not be permitted and, if allowed, renders our bankruptcy laws irrelevant in cases involving regulatory matters.

ARGUMENT

The primary issue in this case is whether Section 525(a) of the Bankruptcy Code, 11 U.S.C. § 525(a), prohibits the Federal Communications Commission ("FCC") from unilaterally canceling the licenses it had previously sold at auction to NextWave. The briefs of counsel for NextWave and the other *amicus curiae* set forth in detail the statutory construction arguments in support of the view that Section 525(a) prohibits the FCC from canceling and reselling the licenses. Those arguments address the plain meaning of the statute, the legislative intent behind the statute (applying such interpretative aids as the legislative history and case law), and the historical basis of the statute itself.

This brief, therefore, respectfully brings to the Court's attention other perspectives on the issues presented including potential effects of Court's ruling on the issues.

I. APPLYING SECTION 525(a) OF THE BANKRUPTCY CODE TO ALLOW THE FCC TO CANCEL NEXTWAVE'S LICENSES IS INCONSISTENT WITH FUNDAMENTAL POLICIES OF BANKRUPTCY LAW

Bankruptcy law serves four commonly accepted goals. One goal is to provide corporate debtors with the ability to rehabilitate themselves and to provide individual debtors with a fresh start. The second goal is to treat similarly situated creditors equally. The third goal is for the bankruptcy process to be an efficient method for distribution of the debtor's assets to those entitled to recovery. The fourth goal is to allow a corporate reorganization to maximize recovery for all constituents,

including creditors and members of the larger community.[1] These various goals often overlap. For example some view the goal of equal treatment for similar creditors as not only fair, but efficient.[2] Further, the goal of maximization of recovery relates to efficiency as well. Standard definitions of efficiency identify wealth maximization as a fundamental tenet of efficiency.

A. The Policy of Debtor Rehabilitation

The idea of a "fresh start," which discharges an individual of his or her past debts, is well established in our bankruptcy system. *See, e.g., Local Loan Co. v. Hunt*, 292 U.S. 234, 244-45 (1934). Corporations and other non-individuals receive a discharge only if they reorganize.[2] The corporate reorganization and discharge is more appropriately referred to as

---

[1]The four criteria used here are generally non-controversial. Yet in the past 15 years the debate over bankruptcy policy has mushroomed with far too many articles to mention here. For a sampling see the articles collected in "The Washington University Interdisciplinary Conference on Bankruptcy and Insolvency Theory" published in 72 Wash. U. L.Q. 1257 (1994). For a few more recent look at the debate *see* G. Eric Brunstad, *Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law*, 55 Bus. Law. 499 (2000)

[2]*See infra* Section I.C.

[2]Section 727(a)(1) of the Bankruptcy Code denies a discharge in a Chapter 7 liquidation cases to non-individual debtors. Section 1141(d) grants a discharge to a debtor which reorganizes under Chapter 11.

"debtor rehabilitation" rather than a "fresh start."[3] This Court has recognized the goal of debtor rehabilitation as a goal of Chapter 11. *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984); *see also United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983) (recognizing the congressional goal of encouraging reorganizations). The legislative history of the Bankruptcy Code refers to debtor rehabilitation as a primary reason for the reorganization provisions of Chapter 11. S. Rep. No. 95-589, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5795.

Some argue that the primary purpose of debtor rehabilitation is to provide the maximum recovery for the creditors. *See, e.g.*, Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. Chi. L. Rev. 815 (1987).[4] Others argue that debtor rehabilitation serves to protect a variety of interests: those of employees, the community (e.g., via contributions to a local tax base), future suppliers, and other groups that are not necessarily creditors. KAREN GROSS, FAILURE AND FORGIVENESS 205-31 (1997); Elizabeth Warren, *Bankruptcy Policy*, 54 U. Chi. L. Rev. 775 (1987). The legislative history supports the latter view by stating that one of the purposes of restructuring a debtor's finances in a Chapter 11 is to allow it to continue to operate and "provide its

---

[3]A corporation that liquidates simply goes out of business. While the owners/shareholders may begin a new enterprise. The liquidating company, however, does not receive a discharge and therefore cannot continue in business since its new revenues would be subject to its old debts, making it impossible to begin a new business under the old bankrupt corporate form.

employees with jobs." H.R. Rep. No. 95-598, at 220 (1977) *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179.

Many sections of the Bankruptcy Code work together to aid rehabilitation: e.g., the automatic stay, 11 U.S.C. § 362, the reorganization provisions of Chapter 11, and Section 525(a), at issue here, which prohibits a government that has issued a license to a debtor from canceling or revoking the license solely because the debtor owes a dischargeable debt to the issuing government.

Whether the purpose of debtor rehabilitation is primarily to serve creditors or is to serve broader interests as well, allowing the FCC to cancel the licenses violates either theory of the purpose of debtor rehabilitation. Without a reorganized debtor, NextWave's creditors will not be paid in full – as they would have been under the proposed plan. Nor will the interests of the other constituents, such as employees, the community, future suppliers, etc., be served. In addition, nothing will remain for the shareholders, as it would under the proposed plan.

B. The Policy of Equal Treatment for Similarly Situated Creditors

The second commonly accepted goal of the bankruptcy system is to assure equality among similarly situated creditors. Creditors with similar claims should be treated equally. This goal stems from the fact that if creditors are left to their state law remedies, creditors with identical sorts of claims (e.g. a typical firm's suppliers) will be treated quite differently. Outside of bankruptcy, creditors are left to their state law remedies to pursue the debtor and recover. As each creditor recovers it can foreclose or execute on the debtor's property. The state law system works so long as there are sufficient assets to satisfy the claims. But when the debtor does not have enough assets to satisfy all the claims the first creditors to "win the race to the court house" recover in full, while subsequent creditors recover

nothing. Under the state law system creditors with similar types of claims, such as general unsecured creditors, are treated very differently – some recover in full and some recover nothing. While it might seem appropriate to reward the diligent – those who pursue their claims quickly – the system is not so precise. Some creditors may draw a judge whose docket moves quickly, while other diligent creditors are assigned a judge whose docket moves more slowly. Other factors as well, such as timing of depositions, or other discovery, can effect the timing of the judgment and recovery.

When the debtor does not have enough funds to pay all its creditors, some creditors will recover in full and some will receive nothing. Bankruptcy evens out this disparity and makes the recovery of similarly situated creditors equal. Under the Bankruptcy Code, unsecured creditors share on a pro-rata basis. *See, e.g.*, Section 726(b). This goal is both fair and efficient. In *Begier v. I.R.S.*, 496 U.S. 53 (1990) this Court cited "equality of distributions" as a "central policy of the Bankruptcy Code. According to that policy creditors of equal priority receive pro rata shares of the debtor's property." *Id.* at 58.[5]

Whether the FCC is a secured creditor or an unsecured creditor, exempting the FCC from Section 525(a) sets a precedent reaching far beyond the facts of this case. It will apply to all cases involving governmental regulatory bodies which issue any sort of "license, permit, charter, franchise, or other similar grant" to an entity that later files a bankruptcy proceeding. Other governmental units can easily create regulatory purposes for the management of the licenses, permits

---

[5]The result is fair: when there are insufficient assets to pay all creditors in full, creditors with similar claims receive equal treatment. Some argue that treating similarly situated creditors is also efficient. *See* Section I.C. *infra*.

and grants they issue. They then could claim they are exempt from Section 525(a) and are allowed to revoke or cancel the license, permit, or other grant when the debtor has failed to pay a dischargeable debt. They could revoke the license, resell it and collect on the new purchase price. These creditors could be paid in full should the value of the right be equal to or greater than the amount of the obligation owed.

In fact, under such a scenario the governmental agency could receive more than it is owed. That is precisely what the FCC hopes to achieve in this case due to the rising prices for FCC licenses. The debtor's other creditors, however would receive far less, if anything at all.

The governmental agency involved would also, in effect, create for itself a priority over the other creditors. The priority of unsecured claims is fixed by Congress in Section 507(a) of the Bankruptcy Code. Only two classes of priority are given by Section 507(a) to governmental agencies: the first is granted to federal, state and local taxing authorities for certain taxes, 11 U.S.C. § 507(a)(8); the second is granted to certain claims owed to "a Federal depository institutions regulatory agency by debtors. 11 U.S.C. § 508(a)(9). No priority has been granted to the FCC nor any other governmental unit. Not only has no priority been granted, Congress denied the FCC's request for just such a priority.[6]

---

[6]As argued in the *Amicus Curiae* brief filed on behalf of the Official Committee of Unsecured Creditors of NextWave Personal Communications, Inc. and BFD Communications Partners, L.P., the FCC aggressively lobbied Congress for just such a priority and the appropriate Congressional Committees turned the agency down.

In fact, this *amicus curiae* testified on behalf of the American Bar Association before Congress on this issue with

Allowing a governmental agency to ignore Section 525(a) on the grounds that its actions are part of a regulatory scheme effectively circumvents the priority provision of the Bankruptcy Code. Congress established a system in the Bankruptcy Code that starts with the premise that all unsecured creditors are treated the same. Congress then provided for the payment of some select creditors ahead of others – child support payments, certain taxes, a limited amount of employee wage claims and others. No such priority has been statutorily given to the FCC. Absent an explicit grant of priority, governmental agencies must be treated equally with other similarly situated creditors. Exempting governmental creditors which claim that a regulatory purpose gives them a right to revoke, cancel, etc., their licenses effectively grants to them a priority not authorized by Congress. The FCC must be subject to Section 525(a) to assure the fair application of the bankruptcy laws.

---

respect to a Resolution passed by the American Bar Association House of Delegates in August 1991 which (1) opposes any new priorities without appropriate notice and hearings and (2) opposes any new priorities absent compelling circumstances. *See* "Statement of Kathryn Heidt, Vice Chair of the Business Bankruptcy Committee of the Business Law Section of the ABA on behalf of the American Bar Association before the Subcommittee on Commercial Law and the Committee of the Judiciary of the U.S. House of Representatives Concerning Priorities for Federal Governmental Agencies Under the U.S. Bankruptcy Code" April 11, 2000.

C. Permitting the FCC to Cancel and Resell NextWave's Licenses Creates Inefficiencies in the Bankruptcy System

Bankruptcy is generally viewed as an efficient response to widespread default. Bankruptcy avoids duplication of costs. If creditors were forced to pursue the debtor in state court, each creditor would spend money on court costs, attorneys fees, and related costs. In addition, the debtor must use some of its limited assets to defend these suits – money that would otherwise be available for ultimate distribution to the creditors. Bankruptcy law mandates that all of the debtor's property becomes property of the estate, 11 U.S.C. § 541(a)(1), and if property is in the possession of someone other than the debtor it must be turned over. 11 U.S.C. § 542(a). All of the debtor's assets and all of the debtor's debts are brought into one proceeding.

Some view the policy previously discussed, treating similar creditors similarly, as efficient as well. They argue that if the creditors could bargain in advance regarding the distribution of assets among them when the debtor defaults, they would agree to share the debtor's available assets on a pro rata basis. The transaction costs of such advance bargaining would be enormous – thus advance bargaining could be inefficient. Bankruptcy law accomplishes the desired result for the creditors in an efficient manner. *See, e.g.*, THOMAS JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 15 (1986).

Should the Court rule in favor of the FCC the bankruptcy courts and district courts will be inundated with litigation requesting relief from Section 525(a) by governments, their agencies and units. As noted, governments will revise their statutes and regulations so as to provide a purported "regulatory purpose" to license revocations and other denials of government permits or grants. Each individual statute or regulation in each case will have to be judged on its own merits. While one might

think that a ruling by this Court allowing the FCC to cancel licenses would provide certainty in the law and thus lessen litigation on this issue, the opposite is the case. Greater certainty exists now. Since 1971, when this Court ruled that a government may not revoke a license for failure to pay a discharged debt in *Perez v. Campbell*, 402 U.S. 637 (1971), and the subsequent enactment of Section 525(a), the law has been certain and uniform on the issue of governmental grant revocations, cancellations, etc. In the 23 years since the current Bankruptcy Code has been in effect, only approximately 85 cases have raised this issue before the courts.[7]

D. Permitting the FCC to Cancel and Re-sell NextWave's Licenses Fails to Maximize the Bankruptcy Estate

One of the goals of bankruptcy law is to maximize the debtor's estate in order to obtain the highest recovery for creditors and perhaps also for other interested parties. Congress recognized that keeping the debtor intact and allowing it to continue in business may yield a better recovery than selling its parts piecemeal. H.R. Rep. 95-59 at 220 (1977), *reprinted at* 1978 U.S.C.C.A.N. 5963, 6179. Simply put, the going concern value often exceeds the liquidation value of a business. Congress hoped to capture that extra value for the debtor's constituents via the Chapter 11 process. This Court has recognized this goal in

---

[7]A computer search was performed using one of the two standard legal research search engines. Results are on file with the author. A broad search of state and federal cases initially yielded 241 cases of which approximately 85 concerned a Section 525(a) issue in bankruptcy involving a government or agency.

several cases. *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. Partnership*, 526 U.S. 434, 453 (1999) (the Court recognized the policies underlying Chapter 11 – of preserving going concerns and "maximizing property available to satisfy creditors, . . ."). Likewise, in *Toibb v. Radloff*, 501 U.S. 157 (1991), the Court said that, among other possible goals, "Chapter 11 also embodies the general Code policy of maximizing the value of the estate." *Id.* at 163 (citing *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985)).

In order for NextWave to reorganize it needs the licenses purchased from the FCC. NextWave is willing to pay the full amount of the purchase price, along with interest and all incurred fees. It has proposed to do so in its plan of reorganization. Additional employees will be hired (some have been working throughout this proceeding), other interests will be served and the shareholders will retain their interests. NextWave's plan of reorganization proposes to pay its other creditors in full and for the shareholders to retain their interests.

One could argue that the better use of the licenses is to sell them to the subsequent purchaser, which proffered a higher bid at the re-auction than NextWave had bid at the original auction. This argument misses the point, however, that NextWave was the highest bidder at the auction at which these licenses were originally sold. The only intervening factor is NextWave's bankruptcy. The question is not whether a purchaser would now pay a higher price for the licenses. Rather the question is whether the FCC can re-sell the licenses in light of NextWave's bankruptcy. All creditors, including the FCC are bound by the Bankruptcy Code, including the provisions of Section 525.

Allowing the FCC to claim retroactively that the licenses were canceled and then to re-auction the licenses fails to maximize the estate. These licenses are crucial to NextWave's

reorganization – a reorganization that will pay the FCC and the other creditors in full, will expand its work force, benefit the community as well as potential customers, and allow the shareholders to potentially reap benefits from their investments.

A precedent allowing the FCC to unilaterally cancel and resell the licenses due to its purported regulatory purpose will open the gates for any governmental agency – federal, state, or local – to incorporate a regulatory purpose into its various licensing procedures. Upon bankruptcy these governmental units could revoke or cancel their licenses or similar grants. In effect, like the FCC in this case, they will attempt to cloak their action with the aura of "regulatory purpose" and thus claim that the obligation at issue is not a dischargeable debt. This, in turn, will cause potentially successful reorganizations to fail – minimizing the results for all concerned.

II. ALLOWING THE FCC AND OTHER GOVERNMENTAL AGENCIES TO CLAIM A REGULATORY EXCEPTION TO SECTION 525(a) WILL ENCOURAGE STRATEGIC BEHAVIOR NOT GROUNDED ON ANY PRINCIPLED OR COHERENT READING OF THE BANKRUPTCY CODE

Should this Court hold that the FCC is not subject to Section 525(a) when it engages in any activity with a "regulatory purpose," the FCC and other governmental units will be compelled to engage in strategic behavior by maintaining inconsistent positions in various cases

Holding that Section 525(a) does not apply to the FCC will also allow for strategic behavior on the government's part in future cases. This behavior will depend on the governmental unit's assessments of a number of facts including: a determination of the value of the license, permit, or other grant,

the amount of the obligation owed, whether the debtor is an individual or an entity, and whether the case is a proceeding under Chapter 11 or Chapter 7.

If the obligation owed for the license or similar grant was not secured, the government has an unsecured claim. If it was secured by a security interest in the license then the obligation is a secured claim for the lesser of the amount owed or the value of the license. 11 U.S.C. § 506(a). If the value of the license is less than the amount owed, the excess is an unsecured claim. *Id.*

If the obligation is unsecured or if the value of the license is below the amount owed, the government's strategy will be to sit back and go through the bankruptcy process. In a Chapter 7 or an 11 case, whether the debtor is an individual or a corporation the government will receive some distribution. If the government is unsecured it will receive its pro rata share of the distribution. If the agency has taken a security interest in the license, it will recover (1) the value of that license (the collateral) and (2) some portion of its unsecured claim as part of the pro rata distribution to unsecured creditors. Instead in either of these scenarios, if the governmental creditor were to argue it is not subject to Section 525(a), it will receive less. In the first example it will receive nothing since, in order to argue Section 525(a) does not apply it will have to argue that it does not have a "debt," which is defined as a "liability on a claim." 11 U.S.C. § 101(12). If the government unit is unsecured and is not owed a debt it will receive no distribution at all since only those with claims share in the bankruptcy distribution. 11 U.S.C. § 726(a). If the governmental unit is secured it may take its license but will receive only the value of the license and nothing on the remaining unsecured claim.

On the other hand, if either the license is worth more than the obligation or if the debtor is an individual it would be beneficial for the government to argue that Section 525(a) does not apply to it.

When the license is worth more than the obligation, the government would claim it is not subject the Section 525(a) and would simply cancel the license, sell it and keep the excess received over the amount of the debt owed. This is precisely what the FCC has attempted in this case.[8] However, as a secured creditor, the FCC should only be entitled to the value of the license or the amount owed, *whichever is less*. 11 U.S.C. §§ 506(a), 1129(b)(1)(A). Instead, the FCC argues that it may cancel the licenses, resell them and keep the excess despite the law of secured credit. A secured creditor may not keep money received beyond the amount owed plus interest and costs of recovery. U.C.C. § 9-608.

If the debtor is an individual the governmental agency will have to assess the individual's likely future earnings. Since the obligation is not a dischargeable debt it, of course, it will not be discharged. Unlike a corporation, however, the individual goes on to lead a (hopefully) productive life after discharge. If the future looks promising the governmental unit may want to argue

---

[8]After the auction at which NextWave purchased its licenses, the value of the licenses fell substantially below the purchase price bid by NextWave due to the auction by the FCC of additional blocks of licenses for personal service communications. When the value of the licenses fell below the amount owed, the FCC would have been partially unsecured. The bankruptcy court found that the licenses were worth approximately $1.02 billion as of February 19, 1997. The decision in the various *NextWave* cases are consistent that the value of the licenses purchased by NextWave had fallen well below the price bid. *See, e.g., NextWave, Inc. v. FCC*, 254 F.3d 130, 136 (2001) referring to *NextWave IV*, 235 B.R. 263, 305 (Bankr. S.D.N.Y. 1998). The value of the licenses later increased beyond the purchase price.

that the obligation is not a dischargeable debt and pursue the debtor post bankruptcy. Conversely, if the potential for future earnings look grim, the government would be better off to fail to raise the Section 525(a) issue and share in the bankruptcy distribution.

Exempting the FCC and other governmental units from Section 525(a) when it engages in any activity it deems "regulatory," will result in the FCC and other governmental units engaging in strategic behavior by maintaining inconsistent positions in similar cases.

III. THE FCC IS ATTEMPTING TO OPT OUT OF THE BANKRUPTCY PROCESS

The FCC is essentially trying to create for itself an election to opt out of the bankruptcy process on a case by case basis. In order to exempt itself from Section 525(a) it argues that NextWave's obligation is not a dischargeable debt. It has further argued that it is not subject to the provisions of Chapter 11 that allow a debtor to cure and reinstate a default as part of its Chapter 11 plan of reorganization.

Other governmental creditors, long before the FCC, have asserted that obligations owed to them were not "debts" within the meaning of the Bankruptcy Code and therefore were not dischargeable. Most notably the State of Ohio in *Ohio v. Kovacs*, 469 U.S. 274 (1985) asserted that an obligation of an individual debtor to clean up a contaminated cite was not a "claim" or "debt." Since the obligation would not be discharged the State could pursue the individual debtor after his Chapter 7 proceeding concluded. Indeed, the State in the *Kovacs* case had a stronger case than does NextWave that the obligation was not

a "claim" and therefore not a "debt."[9] The obligation in *Kovacs* was an injunction ordering Mr. Kovacs to perform the clean-up. Specifically:

> The state of Ohio had ordered the individual debtor to clean up a site contaminated by the debtor and his corporation. When the debtor failed to perform the cleanup, Ohio pursued a remedy under a general state statute that gave a court discretion to appoint a receiver to carry out a judgment. The appointed receiver took control of the debtor's assets. The debtor was dispossessed of the property and was therefore unable to carry out the cleanup himself. Because the debtor could no longer carry out the cleanup, he could only pay money to defray cleanup costs. Therefore, the Court held that by the state's appointment of a receiver, the order had been effectively transformed into an obligation to pay money. *Id.* at 283-284. The Court was careful to say that it was not deciding what the result would have been had the receiver not actually been appointed. *Id.* at 284.

KATHRYN R. HEIDT, ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY at ¶ 3.03[c][ii] (1993).

In this case NextWave's obligation falls within the first definition of "claim" and a "right to payment. 11 U.S.C. § 101(5)(a) and is more easily categorized as a "claim" and therefore a "debt." 11 U.S.C. § 101(12).

In this case the FCC makes the same argument in the context of 525(a). It follows that if the FCC is successful in its argument that it does not have a "claim" or a "debt" then it is not subject to the bankruptcy process at all.

The difficulty with the FCC's argument can be seen in the discussion of a governmental unit's strategic behavior discussed earlier. Assume for a moment that this were a Chapter 7 liquidation and that the value of the licenses remained as depressed as they were at the time of the bankruptcy filing. According to the bankruptcy court the licenses were worth about $1.02 billion at the time the FCC conveyed them to NextWave – far less than the $4.74 billion bid. *NextWave IV*, 235 B.R. 305 (1998), *aff'd*, 241 B.R. 311, 321 (S.D.N.Y. 1999), *rev'd on other grounds* 200 F.3d 43 (2d Cir. 1999). In a Chapter 7 proceeding only those who hold "claims" share in the distribution, 11 U.S.C. §§ 726(a)(1)-(a)(4). In a Chapter 11 proceeding only those with claims may vote on the plan of reorganization. 11 U.S.C. § 1126(a). If, as the FCC asserts, the obligation is not a claim or debt then it will not share in the distribution of the debtor's assets in a Chapter 7 proceeding and, since a Chapter 7 corporate debtor does not continue in business

---

[9]The obligation in *Kovacs* did not fall within the first definition of "claim" in Section since it was not a "right to payment," nor did the statute contain an alternate right to payment in lieu of cleanup. Rather the Court had to decide whether it fell into the more difficult definition of "claim" under Section 101(5)(B), which defines claim as a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, ..." Despite the more stringent standard the Court nonetheless held that the cleanup obligation was a "claim" and therefore a "debt" that was dischargeable in bankruptcy.

the FCC would not recover at all.[10] In a Chapter 11 proceeding it loses the rights to vote as well as other protections.[11]

CONCLUSION

The Court of Appeals decision is consistent with bankruptcy policy, will prevent opportunistic behavior and assures that governmental agencies may not opt out of bankruptcy proceedings simply because their actions are regulatory in nature.

Kathryn R. Heidt
Professor of Law
Counsel of Record
723 Hastings Street
Pittsburgh, Pennsylvania 15206
(412) 441-0648

---

[10]Justice O'Connor first recognized the potential "adverse consequences" in a case involving a government attempting to pursue a Chapter 7 corporation when no assets would remain. *Ohio v. Kovacs*, 469 U.S. 274, 286 (1985).

[11]The provisions regarding classification of claims, treatment of those classes and the minimum amounts that must be afforded claim holders include 11 U.S.C. §§ 1123(a)(i), (a)(3), 1129(a)(7) and 1129(b).

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

June 13, 2002

Kathryn R. Heidt, Esq.
Professor of Law
723 Hastings Street
Pittsburgh, PA 15206

Re: FCC v. Nextwave Personal Communications, Inc., et al.
No. 01-653

Dear Ms. Heidt:

As requested in your letter of June 12, 2002, I hereby consent to the filing of an amicus curiae brief in the above-captioned case.

Due to the delay in receiving incoming mail, in addition to mailing your brief via first-class mail, we would appreciate a fax of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844. Ms. Spadoni's direct dial phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

Sincerely,

Paul D. Clement /s

Paul D. Clement
Acting Solicitor General

06/18/02 16:02 FAX 002

JENNER&BLOCK

Donald B. Verrilli, Jr.

Jenner & Block, LLC
601 Thirteenth Street, NW
Suite 1200 South
Washington, DC 20005-3823
Tel 202-639-6000
www.jenner.com

Chicago
Dallas
Washington, DC

Tel 202 639-6095
Fax 202 639-6066
dverrilli@jenner.com

June 18, 2002

William K. Suter, Clerk
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Re: Blanket Consent for Amici Curiae Briefs
Federal Communications Commission v. NextWave Personal Communications, Inc., et al., Docket No. 01-653
Arctic Slope Regional Corp., et al., v. NextWave Personal Communications, Inc., et al., Docket No. 01-657

Dear Mr. Suter:

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc., by their undersigned attorney, hereby grant a blanket consent for the filing of all amici curiae briefs in the above-captioned cases.

Please let me know if you need any additional information.

Sincerely,

Donald B. Verrilli, Jr.
Counsel for Respondents

cc: Paul Clement
Jonathan Franklin

U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

June 13, 2002

Kathryn R. Heidt, Esq.
Professor of Law
723 Hastings Street
Pittsburgh, PA 15206

Re: FCC v. Nextwave Personal Communications, Inc., et al.
No. 01-653

Dear Ms. Heidt:

As requested in your letter of June 12, 2002, I hereby consent to the filing of an amicus curiae brief in the above-captioned case.

Due to the delay in receiving incoming mail, in addition to mailing your brief via first-class mail, we would appreciate a fax of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844. Ms. Spadoni's direct dial phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

Sincerely,

Paul D. Clement
Acting Solicitor General

JENNER&BLOCK

Donald B. Verrilli, Jr.

Jenner & Block, LLC
601 Thirteenth Street, NW
Suite 1200 South
Washington, DC 20005-3823
Tel 202-639-6000
www.jenner.com

Chicago
Dallas
Washington, DC

Tel 202 639-6095
Fax 202 639-6066
dverrilli@jenner.com

June 18, 2002

William K. Suter, Clerk
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

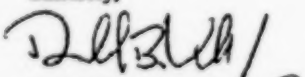
Re: Blanket Consent for Amici Curiae Briefs
Federal Communications Commission v. NextWave Personal Communications, Inc., et al., Docket No. 01-653
Arctic Slope Regional Corp., et al., v. NextWave Personal Communications Inc., et al., Docket No. 01-657

Dear Mr. Suter:

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc., by their undersigned attorney, hereby grant a blanket consent for the filing of all amici curiae briefs in the above-captioned cases.

Please let me know if you need any additional information.

Sincerely,



Donald B. Verrilli, Jr.
Counsel for Respondents

cc: Paul Clement
Jonathan Franklin